76-938

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States of America and the Federal Maritime Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, pp. 1a-42a) and of the Federal Maritime Commission (App. C, *infra*, pp. 45a-79a) are not yet reported.

appears at 543 F.2d 395. The opinion

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 43a-44a) was entered on August 27, 1976. The Chief Justice on November 19, 1976, granted an extension of time to and including January 5, 1977, within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether national labor policy requires exemption of collective bargaining agreements as a class from the filing and approval requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814.

2. Whether, assuming national labor policy does not require such a blanket exemption, the collective bargaining agreement at issue in this case, which imposes conditions on employers who are not parties to the agreement, is nevertheless exempt from the filing and approval requirements of Section 15 of the Shipping Act, 1916.

STATUTORY PROVISIONS INVOLVED

Sections 15, 16 and 17, of the Shipping Act, 1916, 39 Stat. 733-734, as amended, 46 U.S.C. 814-816, are set out in Appendix D, *infra*, pp. 80a-86a.

STATEMENT

The agreement involved here grew out of negotiations between the Pacific Maritime Association

(PMA) and the International Longshoremen's and Warehousemen's Union (ILWU) concerning use by non-members of PMA of dockworkers dispatched through the ILWU-PMA hiring halls. PMA, a multi-employer bargaining organization, is composed of steamship companies, terminal operators, stevedores and related companies doing business on the West Coast (J.A. 169, 361).[1] The ILWU represents dockworkers hired not only by PMA, but also by non-member employers.

Longshoremen on the West Coast are referred for employment through hiring halls jointly sponsored and supervised by PMA and the ILWU (J.A. 171-172). Prior to 1972, employers who were not members of PMA could secure employees through these hiring halls, and could participate in the PMA fringe benefit plans, by negotiating separate labor contracts with the ILWU, and supplemental participation agreements with PMA and ILWU (J.A. 172). The nonmembers paid specified fees to defray administrative expenses, and contributed to the fringe benefit funds in which they participated, but they were not required to use all the administrative services of PMA (which include central records and pay offices), and were free to determine by contract with the ILWU whether they should participate in all of the fringe benefit programs (J.A. 213-214). The ILWU also allowed some nonmembers to retain substantially

[1] "J.A." refers to the Joint Appendix in the court of appeals, which has been lodged with the Court.

steady workforces, although it used the union's control of the daily dispatching process to rotate nearly all the men working for PMA (J.A. 180). The practice of negotiating separate labor agreements enabled the ILWU to whipsaw by striking PMA while continuing to work for nonmembers (App. A, *infra*, p. 4a).

PMA asserted that the partial participation of nonmembers in administrative and fringe benefit programs is an administrative burden (J.A. 172-173). It also considered it unfair that nonmembers should receive the benefits of PMA bargaining over the registered workforce and fringe benefits without suffering the consequences of labor disputes between PMA and ILWU, and that nonmembers could even take over PMA members' work while the ILWU struck PMA (J.A. 173). In addition, it perceived the steady workforce of some nonmembers as giving them greater efficiency, and a preference in allocations at times of labor shortage (J.A. 180).

For these reasons, PMA, at the beginning of contract negotiations in December 1970, proposed that the basic Pacific Coast Longshore and Clerks Agreement "be amended to eliminate nonmember participation under any provisions of the Agreement unless they are not permitted by law to become members of the Association" (J.A. 170). The ILWU had proposed that "PMA will accept all fringe benefit contributions from any employer" (*ibid.*). After a strike on other issues was settled, a "ILWU-PMA Nonmember Participation Agreement," dealing with nonmember use of the joint workforce, was signed on April 25, 1972 (J.A. 186-187, 362-363); this was subsequently amended by a version adopted June 24, 1973 ("Revised Agreement") (J.A. 363, text at J.A. 452-454), which is at issue in this case.

The proceedings in this case began in 1972 when a group of public port authorities, nonmembers of PMA, filed a complaint[2] with the Federal Maritime Commission alleging that the ILWU-PMA Nonmember Participation Agreement was subject to the approval of the Commission under Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, before implementation and that implementation of the agreement violated Sections 15, 16 and 17 of that Act, 46 U.S.C. 814, 815 and 816.

Section 15 (App. D, *infra*, pp. 80a-83a) applies to every common carrier by water,[3] and any other

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[2] PMA and ILWU were the initial respondents. The Council of North Atlantic Shipping Associations ("CONASA"), an East Coast employers' organization, intervened on PMA's side before the Commission. CONASA also intervened before the court of appeals.

[3] Common carrier by water is defined by Section 1 of the Act, 39 Stat. 728, as amended, 46 U.S.C. 801, to include a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas. A common carrier by water in foreign commerce means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its districts, territories or possessions and a foreign country, whether in the import or export trade (other than an ocean tramp). Common carrier by water in interstate commerce means a

person carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water. It requires them to file immediately with the Commission a copy of every agreement, or modification thereof, with another such carrier or such person, "to which it may be a party or conform in whole or in part," if the agreement controls, regulates, prevents or destroys competition or meets certain other specifications. Section 15 requires the Commission, by order after notice and hearing, to disapprove, cancel or modify any agreement or modification that it finds (1) to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors; (2) to operate to the detriment of the commerce of the United States; (3) to be contrary to the public interest; or (4) to be in violation of the Shipping Act, 1916, including Sections 16 and 17.

Before Commission approval or after disapproval, it is unlawful to carry out any agreement required to be filed. Agreements lawful under Section 15 are excepted from the antitrust laws. 15 U.S.C. 1-11 and 15.

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common carrier engaged in the transportation by water of passengers or property on the high seas (or Great Lakes) on regular routes from port to port between one state, territory, district or possession of the United States and another, or between places in the same territory, district or possession.

The Commission, by order of October 19, 1972, severed the issue of its jurisdiction under Section 15. In an opinion and order dated January 30, 1975, it concluded that it had jurisdiction under Section 15 over the Revised Agreement, and that the agreement must be filed in accordance with the requirements of that Section (App. C, *infra*, p. 56a).

The Commission found that the agreement controlled or affected competition among persons subject to the Shipping Act.[4] These persons included ocean common carriers and terminal operators who, as members of PMA, were parties to the agreement. The effects on competition included higher costs to nonmembers than to members, resulting because the agreement ignored differences in methods of operation and locality (App. C, *infra*, p. 68a). The Commission also noted that failure of nonmembers to

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[4] The initial and Revised Agreement, the Commission found (App. C, *infra*, pp. 47a-48a, n. 2), required that (1) nonmembers join the PMA for an indefinite period as a condition to the direct employment of any member of the joint PMA-ILWU workforce; (2) any separate contract between a nonmember and the ILWU conform to the provisions of the Revised Agreement; (3) nonmembers employ members of the joint workforce only through PMA allocation procedures and the ILWU-PMA dispatching halls; (4) nonmembers pay dues and assessments and accept proportional liability as to obligations of the PMA; and (5) nonmembers adhere to PMA decisions as to work stoppages, strikes and lockouts. The Revised Agreement states in paragraph 3 that "the essence of [the provisions relating to work stoppages] is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants" (J.A. 452).

sign the agreement would deprive them of ILWU personnel, for whom there were no replacements in skilled jobs, and that hiring of nonunion personnel as a necessary result of the nonmember's refusal to sign the agreement would precipitate confrontations with union personnel, which would interfere with the nonmember's conduct of business (App. C, *infra*, pp. 70a-71a).

Following its earlier decision in *United Stevedoring Corp.* v. *Boston Shipping Association*, 16 F.M.C. 7, the Commission concluded that the agreement comes within the filing and approval requirements of Section 15 unless it is entitled to a "labor exemption" analogous to the labor exemption from the antitrust laws (App. C, *infra*, p. 56a).

The Commission made no finding whether the agreement met two of the tests of the *Boston Shipping* case; that is, whether it was the result of good faith bargaining or whether the union had entered into a "conspiracy" with management (App. C, *infra*, pp. 59a, 69a). It found, however, that the agreement did not meet two other tests: (1) it did not relate to a mandatory bargaining subject since it was not directed at the labor relations of PMA and its own employees but rather at the relations of nonmembers and the ILWU, and (2) it imposed terms on persons outside the bargaining unit—that is, the nonmember employers—to which those persons must conform, or incur sanctions contained in the agreement (App. C, *infra*, pp. 59a-69a). The Commission stated that the agreement, by imposing terms on third parties,

bore a "striking resemblance" to the one found unlawful in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (App. C, *infra*, p. 66a). The Commission concluded that the agreement had a "minimal effect on the collective bargaining process," but "a potentially severe and adverse effect upon competition under the Shipping Act," so that, on balance, assertion of its jurisdiction under the Shipping Act was warranted (App. C, *infra*, p. 70a).[5] The Commission ordered the case set for hearing on the merits (App. C, *infra*, pp. 76a-77a).

On petition for review of that order, the court of appeals reversed. After lengthy preliminaries,[6] the court stated that "[w]e must * * * draw the line between shipping, labor and antitrust concerns in such a way that each statutory scheme remains effective" (App. A, *infra*, p. 27a). Because of the prior approval requirement of Section 15, which has no counterpart in the antitrust laws, the Commission's rul-

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[5] Commissioner Morse dissented, arguing that, in light of the labor policies involved, the Commission had discretion whether to exercise its jurisdiction, and should defer to the National Labor Relations Board and the courts. He also expressed reservations concerning Commission jurisdiction over "mixed membership" organizations, such as PMA might be, which include persons not by themselves subject to the Shipping Act (App. C, *infra*, pp. 73a-75a).

[6] The opinion summarizes the history of this litigation. It then traces the evolving relationship between the antitrust laws and the Shipping Act (App. A, *infra*, pp. 10a-15a), labor policy and antitrust policy (App. A, *infra*, pp. 15a-23a), and national labor policy and the Shipping Act (App. A, *infra*, pp. 23a-26a).

ing "would make nearly impossible the maintenance or prompt restoration of industrial peace" in maritime labor relations (App. A, *infra*, p. 28a). The court concluded that this problem was not sufficiently alleviated by the interim approval procedures developed by the Commission for use in labor-related cases (App. A, *infra*, pp. 29a-30a). The court also noted that the legislative history of the Shipping Act makes no mention of labor agreements among the "problem agreements" to be regulated by the Commission (App. A, *infra*, p. 34a).

The court distinguished *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 ("*Volkswagen*"), which held that the Commission had jurisdiction over a contract among employers that was related to a labor agreement. In this case, however, the contested agreement was part of the collective bargaining contract, not merely a "labor-related" agreement among employers. In the court's view, this difference was important (App. A, *infra*, pp. 33a-34a), although it agreed the distinction might seem arbitrary (App. A, *infra*, p. 35a), and although the Second Circuit had expressly rejected such a distinction in *New York Shipping Ass'n* v. *Federal Maritime Commission*, 495 F. 2d 1215, 1220, certiorari denied, 419 U.S. 964 ("*New York Shipping*") (App. A, *infra*, p. 36a, n. 33). The court concluded:

> [W]e see no valid purpose in extending that rule [of *Volkswagen*] to encourage immediate disruption of negotiations. Exempting collective bargaining agreements as a class from section 15 is the best method to reconcile these conflicting labor and shipping objectives [App. A, *infra*, p. 35a].

The court added that even if a balancing test were to be applied to the agreement at issue, the agreement would be exempt from filing under Section 15 (App. A, *infra*, p. 35a). It characterized the nonmembers' argument as basically an assertion that "they are being forced against their wills into a multi-employer unit" and concluded that Section 15 was not intended to cover problems "so clearly within the realm of National Labor Relations Board expertise" (App. A, *infra*, p. 37a). In the court's view, the proper forum for balancing of labor and antitrust considerations is the courts (App. A, *infra*, p. 38a).[7]

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[7] Although the court recognized a broad labor exemption from Section 15, it did not extend such an exemption to Sections 16 and 17 of the Shipping Act. The court thought that these sections should be subject to a labor exemption similar to that under the antitrust laws (App. A, *infra*, p. 40a). It noted, in addition, that labor agreements exempt from the filing requirement of Section 15 would not qualify for the Shipping Act immunity from the antitrust laws that is accorded agreements approved under Section 15. They would remain subject to the antitrust laws, although the court suggested that some "nonstatutory [labor] exemption" from the antitrust laws might be created for those agreements (App. A, *infra*, p. 41a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals that all collective bargaining agreements are exempt from Section 15 of the Shipping Act, 1916,[8] is in direct conflict with the decision of the Second Circuit in *New York Shipping*, *supra*. The conflict places the Federal Maritime Commission in an untenable position in determining the extent of its jurisdiction.

The opinion in the present case takes on particular importance since Commission orders are reviewable in the United States Court of Appeals for the District of Columbia Circuit or the circuit in which the petitioner resides or has its principal office. 28 U.S.C. 2343. It can be expected that future challenges to the Commission's exercise of jurisdiction over collective bargaining agreements will, because of the opinion in this case, be pursued in the District of Columbia Circuit.

The decision here is important not only because it gives rise to a conflict in the courts of appeals, but also because the issue on which the courts disagree is a significant one. Although this Court in *Volkswagen* did not address the extent of the exemption from Section 15 for collective bargaining agree-

[8] This holding is the law of the circuit for purposes of future cases brought in the District of Columbia Circuit, although in this case the court alluded to a possible alternative basis for its result. Of course, when a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537, citing *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486; *Massachusetts* v. *United States*, 333 U.S. 611, 623.

ments (see 390 U.S. at 278), Mr. Justice Harlan, concurring (*id.* at 282-291), and Mr. Justice Douglas, dissenting in part (*id.* at 295-316), discussed it at some length. Indeed, Mr. Justice Harlan pointed out the importance of defining the Commission's jurisdiction in this area. *Id.* at 286.

In *New York Shipping*, *supra*, which concerned an assessment agreement similar to that at issue in *Volkswagen*, the Second Circuit held that the Commission was not ousted of jurisdiction over the agreement simply because it was part of a collective bargaining agreement. Petitioner had argued that its cargo assessment agreement was exempt because, unlike *Volkswagen*, the union involved "took an active part in negotiating and is a party to the agreement here at issue." 495 F. 2d at 1220. Speaking for the court, Judge Friendly rejected this argument as a "distinction without a difference":

> the fact that the union has here succeeded in forcing NYSA to bargain over the assessment formula does not by itself take the formula out of the reach of § 15. The union's achievement demonstrates its power to force this concession, but it does not dilute the magnitude of problems raised by the formula for shippers and carriers. [*Id.* at 1220-1221.]

The court held that the agreement raised " 'shipping' problems logically distinct from the industry's labor problems" (quoting *Volkswagen*, *supra*, 390 U.S. at 286-287 (Harlan, J., concurring)), and it agreed with the Commission that because the Shipping Act

problems clearly predominated over the labor interests, the agreement was not exempt from Commission jurisdiction under Section 15. *Id.* at 1221-1222.[9]

By contrast, the court of appeals in this case held that agreements between labor and management are, as a class, exempt from Section 15 of the Shipping Act (App. A, *infra*, p. 35a). It makes no difference how strong the Shipping Act interests and how weak the labor interests: so long as the union is a signatory to the agreement, it is beyond the scope of Section 15. Expressly disagreeing with the Second Circuit, the court stated: "[W]e cannot accept the conclusion that active negotiation of the agreement by the union is 'a distinction without a difference.' 495 F. 2d at 1220" (App. A, *infra*, p. 36a, n. 33).

Although the court discusses the overlapping concerns of the antitrust laws, the Shipping Act and

[9] The United States Court of Appeals for the First Circuit, in an unreported opinion, *Boston Shipping* v. *United States* (No. 72-1004, May 31, 1972), avoided deciding the issue of the coverage of collective bargaining agreements by Section 15, because the Federal Maritime Commission had asked to have that case remanded for further consideration of whether a collective bargaining agreement as to allocation of labor gangs among stevedores was subject to Section 15. The First Circuit noted, however, that it finds a distinction "very clear in [*Volkswagen*] * * * between attaching a separate, section 15, agreement, in which the union has little interest, to a collective bargaining agreement, and making a multi-employer agreement with a union, eyeball to eyeball, but which, by the very fact that it is multi-employer, has some effect on employer competition" (*id.* at 80a-81a). This statement suggests that the First Circuit also would not adopt the *per se* rule of the District of Columbia Circuit.

labor policy involved here, its decision to create a *per se* exemption for collective bargaining agreements precludes giving any weight to the provisions of Section 15 even when labor interests are clearly subsidiary to or are logically distinct from Shipping Act issues.

An important purpose of the Shipping Act is to provide a special forum for resolving issues concerning the anticompetitive effects of agreements affecting shipping. It allows more lenient treatment than the antitrust laws when this is necessary to protect the public interest, and it provides additional grounds to be considered in approving and disapproving agreements. See *Volkswagen*, *supra*, 390 U.S. at 274, n. 21. The Shipping Act should therefore not be lightly overriden in favor of competing concerns.

The refusal of the court below to give any weight to Shipping Act considerations is based upon a misapprehension concerning the effects of Section 15 on the collective bargaining process. The court concluded that the prior approval requirements of Section 15 are so harmful to collective bargaining in the maritime industry that giving *any* weight to Shipping Act considerations would be counter to national labor policy. But the Commission's approach in this area will affect few labor agreements. Pursuant to the tests developed by the Commission [10] and applied by it in this case, the Commission recognizes a labor

[10] These factors are set forth in *United Stevedoring Corp.* v. *Boston Shipping Association*, *supra*.

exemption from Section 15 for most collective bargaining agreements, analogous to the labor exemption from the antitrust laws.

Even if part of a labor agreement, as in this case, is brought into question, any severable parts that are not covered by Section 15 can be implemented without waiting for approval; in addition, temporary approval and expedited handling can be sought from the Commission.[11]

Moreover, it is by no means clear that delay in putting a labor agreement into effect is harmful to collective bargaining when that delay is to obtain approval which assures against subsequent invalidation of that agreement. Nor is it clear that the uncertainty resulting from prior approval is substantially greater than uncertainty associated with the possibility of later invalidation of the agreement under the antitrust laws and Sections 16 and 17 of the Shipping Act. As Mr. Justice Harlan observed in *Volkswagen*, "I would find it very difficult to see why provision for advance approval and exemption of labor related agreements would not be preferable, from the standpoint of facilitating collective bargaining, to the 'wait and see' approach." 390 U.S. at 285-286.

Even if the effects of Section 15 on the collective bargaining process were as substantial as the court

[11] It is the Commission's general policy promptly to grant interim approval to collective bargaining agreements in appropriate cases, when asked to do so by the signatories. No request for interim approval or expedited handling was made in this case by either PMA or ILWU.

believes, this is nonetheless not an adequate basis for a *per se* rule that is applied regardless of the strength of the labor interests, or the adverse effects of the agreement on competition in the maritime industry.[12] This result is contrary to the fundamental canon of statutory construction that if there are two acts upon the same subject, the rule is to give effect to both if possible.[13] In the present case a balancing test does in fact make it possible to give effect to both labor and Shipping Act considerations, and is workable in practical applications, as the Second Circuit has shown in *New York Shipping*, *supra*.

2. The court of appeals stated that even if it were to adopt a balancing test to determine if the Commission had jurisdiction in this case, the agreement would be exempt from filing (App. A, *infra*,

[12] Sections 16 and 17 of the Shipping Act and the antitrust laws, which the court relies upon to replace Section 15, are by no means a complete substitute. Section 15, for example, permits disallowance of agreements under a broad "public interest" standard, or on the general ground that they operate "to the detriment of the commerce of the United States." Section 16 by contrast contains a more specific prohibition on giving "undue or unreasonable preference or advantage." Section 17 is also more specific: it makes unlawful rates, fares, or charges which are "unjustly discriminatory between shippers or ports" or "unjustly prejudicial to exporters of the United States as compared with their foreign competitors."

[13] *United States* v. *Borden*, 308 U.S. 188, 198, citing *United States* v. *Tynen*, 11 Wall. 88, 92, and *Henderson's Tobacco*, 11 Wall. 652, 657.

p. 35a). The court's ruling in this regard, which we believe to be in error, also raises important issues relating to the extent of the Commission's jurisdiction, as well as issues concerning the application of the Shipping Act, 1916, when both labor interests and practices affecting competition are present.

The Commission in this case determined that the Shipping Act concerns outweighed labor concerns. The Commission found this case analogous to *United Mine Workers* v. *Pennington*, *supra*,[14] because, like *Pennington*, it involved a collective bargaining agreement in which a union and one set of employers agreed to impose terms upon another set of employers outside the bargaining unit.[15] In producing an immediate impact outside the PMA bargaining unit, the agreement would disadvantage ports in competition with PMA.

According to the court, however, "the nonmembers' argument boils down to an accusation that they are being forced against their wills into a multi-employer unit"; this possible violation of the

[14] Since Section 15 of the Shipping Act is to a large degree a surrogate for the antitrust laws in the area of ocean shipping, the use of labor-antitrust criteria in drawing balances is proper. See *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 738-739.

[15] The Court said in *Pennington* that "[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." 381 U.S. at 666.

labor laws, the court believed, is a matter within the expertise of the National Labor Relations Board and, because the Labor Board has no primary jurisdiction over anticompetitive agreements, federal courts should be left to resolve the balancing of antitrust policies and collective bargaining objectives (App. A, *infra*, pp. 37a-38a).

Although purporting to balance interests (App. A, *infra*, p. 35a), the court in effect has held that because the dispute can be characterized in labor terms, the Commission is ousted of jurisdiction. This confuses the existence of a labor interest with the strength of that interest, and reverts to a standard very similar to a *per se* rule. The fact that, in the course of seeking to impose terms on employers outside the bargaining unit, PMA and the union may have violated the labor laws as well as the antitrust laws is, we submit, no reason to deprive the Commission of jurisdiction.[16]

On the basis of *Pennington* and related cases,[17] a proper balancing of labor and shipping interests in this case leads to the conclusion that there was minimal legitimate labor interest in the Revised Agreement insofar as it imposed conditions on employers

[16] The existence of collateral labor law issues would not deprive an antitrust court of Sherman Act jurisdiction in a comparable situation. See, *e.g.*, *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 626.

[17] See, *e.g.*, *Local Union No. 189* v. *Jewel Tea Co., Inc.*, 381 U.S. 676; *Connell Construction Co.* v. *Plumbers & Steamfitters*, *supra*.

that were not parties to it. Therefore no labor exemption should have been applied to that agreement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1140

PACIFIC MARITIME ASSOCIATION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION PORTS OF ANACORTES, ET AL., INTERVENORS

No. 75-1215

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of an Order of the Federal Maritime Commission

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Argued February 27, 1976

Decided August 27, 1976

Before: WRIGHT, MCGOWAN and TAMM, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: This appeal constitutes the most recent controversy in a series of cases exploring the jurisdictional overlapping of shipping, labor and antitrust concerns in collective bargaining agreements within the shipping industry. At issue in the controversy is applicability of the pre-implementation filing and approval procedure of section 15 of the Shipping Act of 1916 to a collective bargaining agreement between the union and a multi-employer bargaining unit. The Federal Maritime Commission (FMC or Commission) held a portion of the agreement affecting employers who are not members of the Pacific Maritime Association (PMA) to be outside the labor/antitrust exemption and thus subject to filing with and approval or disapproval by the FMC. Recognizing that the reconciliation of the competing policies and statutory schemes is a difficult one, we nonetheless believe the prior-restraint procedures of section 15 impose such an extraordinary burden on collective bargaining that the dividing line must be drawn between labor-related agreements among employers, which are subject to section 15, and direct agreements negotiated between union and management, which we hold to be outside the scope of that section. For the reasons which follow, we remand to the Federal Maritime Commission.

I. FACTUAL BACKGROUND

PMA is an employers' collective bargaining association representing numerous Pacific Coast employers of dockworkers. The International Longshoremen's and Warehousemen's Union (ILWU), which represents dockworkers hired not only by PMA but also by nonmember employers, bargains separately with the multi-employer unit and with individual nonmember ports. At issue in this appeal are 1972 and 1973 agreements negotiated[1] by PMA and ILWU regarding nonmember use of dockworkers jointly registered and dispatched through ILWU-PMA hiring halls to both PMA and nonmember employers. Prior to this agreement, nonmember employers negotiated separate labor agreements with ILWU; they also obtained separate agreements with PMA which allowed them to use the hiring halls and the complex accounting and pay offices[2] maintained

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[1] The FMC made no findings of fact as to whether the agreement was a result of "eyeball to eyeball" good faith bargaining. Pacific Maritime Ass'n., Doc. No. 72-48 (FMC, Jan. 30, 1975), J.A. at 523. Although the FMC has denigrated the union's interest in obtaining uniform fringe benefits and access for all employees to joint hiring hall accounting procedures—conclusions which we find highly questionable—the affidavits of both petitioner ports, J.A. at 86-87, and PMA, J.A. at 183-88, 194-203, reveal a history of collective bargaining over nonmember participation and a concrete controversy between PMA and the ILWU in 1972 which was resolved by negotiation and compromise.

[2] Because jointly registered employees work varying hours for separate employers, not all of whom have agreed to identical fringe benefits, the dispatch and accounting procedures

by PMA. Under these separate agreements, nonmembers paid fringe benefit fund contributions and a participation fee [3] to the PMA for whichever of the fringe benefit programs [4] settled upon in their ILWU contracts. In addition to the differences in fringe benefit plans between PMA and nonmember collective bargaining agreements, there were other substantial labor variances. For example, nonmembers often negotiated steady workgangs rather than the rotation of workers generally required for PMA employers. In addition, the practice of negotiating separate labor agreements had enabled the union in the past to whipsaw by striking PMA but continuing to work for nonmembers.

At the beginning of negotiations for the 1972 collective bargaining agreement, the union demanded PMA to accept all fringe benefit contributions from any employer. In contrast, PMA proposed elimination of all nonmember participation in the fringe benefit fund. J.A. at 170. When the parties failed to reach agreement on other direct economic issues, ILWU went on strike. Several months later the

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require detailed record-keeping. *See* J.A. at 134. *See also* C. LARROWE, SHAPE-UP AND HIRING HALL chs. 5-6, at 139-83 (1955).

[3] The participation fee represented administrative costs of the individual fringe benefit, not of the entire hiring hall. PMA Br. at 7; *compare* J.A. at 11-13.

[4] Fringe benefits include a vacation plan, pay guarantee plan, pension plan, welfare plan, and a holiday plan. ILWU Br. at 16 note.

union and PMA executed a memorandum of understanding resolving some terms in dispute and listing some 11 others to be resolved by further negotiation, mediation or arbitration; the list included resolution of the nonmember participation dispute. Within three months PMA and the union issued Supplemental Memorandum of Understanding No. 4, the agreement primarily at issue in this appeal.[5] In the Supplemental Memorandum the parties agreed that PMA would accept contributions from all nonmembers who executed a uniform participation agreement. This standard agreement, included in the Supplemental Memorandum, would require nonmembers, as a condition of using the joint dispatching halls for jointly registered employees, to participate in all fringe benefit programs,[6] pay the same dues and as-

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[5] PMA has strongly contested the FMC finding that the Revised Agreement of 1973 is substantially the same as Supplemental Memorandum of Understanding No. 4. J.A. at 347-50.

[6] 7. The nonmember participant shall participate in the ILWU-PMA Pension Plan, the ILWU-PMA Welfare Plan, the PMA Vacation Plans (longshoremen and clerks, and walking bosses/foremen) and the ILWU-MA Guarantee Plans (longshoremen and clerks/ and walking bosses/foremen) in accordance with the terms applicable to such participation. Such nonmember shall make payments into these Plans at the same rates and at the same times as members of PMA are to make the respective payments. Attached are statements of terms and conditions currently in effect with respect to such participation. Nonmember Participants shall be subject to the same audits as members of PMA.

[Footnote continued on page 6a]

sessments as PMA members,[7] use steady men "in the same way a member may do so," [8] and be treated as a member during work stoppages.[9]

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[6] [Continued]

Revised Agreement ¶ 7, J.A. at 453. *See also* Supplemental Memorandum No. 4 ("S.M.4") ¶ 4, J.A. at 425.

[7] 9. Each nonmember participant shall pay to the PMA an amount equal to the dues and assessments on the same basis that a PMA member would pay. Payments shall be made at the same time the member would pay.

Revised Agreement ¶ 9, J.A. at 453. *See also* S.M.4 ¶ 6, J.A. at 426.

[8] 5. A nonmember participant may obtain and employ a man in the joint work force on a steady basis in the same way a member may do so. When such participant employs a man to work on a steady basis, it shall notify PMA immediately. On request from PMA, each such participant shall furnish to PMA a list of men it is using on a steady basis. Steady men shall participate in the Pay Guarantee Plan in accordance with the rules that are adopted by PMA and ILWU.

Revised Agreement ¶ 5, J.A. at 453. *See also* S.M.4 ¶ 3a, J.A. at 425.

[9] 3. A nonmember participant will share in the use of the joint work force upon the same terms as apply to members of PMA. For example

a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA,

b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,

c) if during a work stoppage by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch

Several municipal corporations which own and operate Pacific Coast facilities and which are not members of PMA filed a petition with the Commission seeking investigation of Supplemental Memorandum of Understanding, No. 4 [10] and rulings that the agreement was subject to filing and approval under section 15 of the Shipping Act and was violative of Sections 15, 16 and 17 as unjust, discriminatory and contrary to the public interest. After PMA filed the Nonmember Participation Agreement with the Commission, the FMC severed, for expeditious resolution, the issue of jurisdiction under section 15 (and a possible labor exemption) over the master collective bargaining agreement, Supplemental Memorandum No. 4, and underlying agreements among PMA members.

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hall for PMA members, such limited dispatch shall be available to nonmember participants.

The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.

Revised Agreement ¶ 3, J.A. at 452. *See also* S.M.4 ¶¶ 8-10, J.A. at 426-27.

The Revised Agreement also required uniform terms regarding selection of men in the joint work force, continuance of obligation to pay PMA assessments, and use of uniform payment and record forms.

[10] The Commission's first order established an investigation as to any violations of sections 15, 16 and 17 by those agreements "between and among members of PMA" which were embodied in the collective bargaining agreement and the Supplemental Memorandum. 37 Fed. Reg. 18495 (1972); J.A. at 12.

Although the agreement appeared to be outside the labor/antitrust exemption, the Memorandum of Law of Hearing Counsel of the FMC found:

> [T]he subject agreements involve antitrust and related labor policies and require a determination whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining. For these reasons, we submit, these matters ought to be left to the courts and the NLRB who are equipped to cope with them.

J.A. at 77-78. The Memorandum also suggested that should the courts find the agreements lawful under antitrust principles, actual practices implementing them might still violate sections 16 and 17. *Id.* The parties then responded with memoranda of law and affidavits in which they expressed counter allegations and denial of a conspiracy between PMA and ILWU "to eliminate outside competition either by withholding labor or by forcing outside employers into PMA membership." J.A. at 297. Hearing Counsel concluded again that the problem raised

> issues primarily of a labor and antitrust nature and that if the Commission pursued the investigation it would become enmeshed in areas foreign to its expertise. Furthermore, such an investigation would serve to impede the parties seeking relief in the pending antitrust cases before the courts.

Id. at 301.[11]

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[11] The pending antitrust cases to which Hearing Counsel refers were discussed at length in his first Memorandum, J.A. at 57-61. In the first case, *Port of Anacortes* v. *PMA and ILWU*, Civil No. 72-618 (D. Ore., filed Aug. 2, 1972), eight ports challenge Supplemental Memorandum No. 4 under the antitrust laws. The second case, brought by the Port of Longview, makes basically the same allegations of antitrust conspiracy violations. Port of Longview v. PMA and ILWU, Civil No. 72-626 (D. Ore., filed Aug. 3, 1972). The third case added to the general antitrust claims a challenge to the collective bargaining agreement provision concerning containerized shipments. Port of Seattle v. PMA, Civil No. 214-72C2 (W.D. Wash., filed Apr. 4, 1972). All three cases were stayed pending Commission determination of the status of the agreements under the Shipping Act.

During the pendency of the proceedings before the Commission, PMA and ILWU began negotiations on a new agreement. The new Memorandum of Understanding (June 24, 1973) included as Article IX a revised ILWU-PMA Nonmember Participation Agreement containing provisions similar to those challenged in the 1972 Supplemental Memorandum. The Commission then amended the scope of its proceedings to include this 1973 agreement. 39 Fed. Reg. 4506 (1974).

One year later, in January of 1975, the Commission served its Report and Order in this case. The FMC rejected the Memorandum of Hearing Counsel and found instead that the revised agreement, *i.e.* Article IX of the 1973 collective bargaining agreement, is an "agreement" subject to FMC filing and approval. Applying the standards articulated in *United Stevedore Corp.* v. *Boston Shipping Association*, 16 F.M.C. 7 (1972), the Commission found the agreement to be outside the protection of a labor exemption to the Shipping Act and ordered an in-

vestigation to determine whether the agreement should be approved and whether the master collective bargaining agreement, would violate sections 16 and 17. PMA and ILWU then appealed to this court.

II. Legal Background

Before resolving the issues in this case we turn briefly to the three lines of cases which converge in the jurisdictional dispute before us. The first line of cases reflects the tension created by the special shipping considerations in maritime antitrust litigation. The second examines and attempts to reconcile the disparate aims of national labor policy and antitrust laws. The final series of cases deals with implications of Shipping Act regulation on collective bargaining.

A. *Antitrust/Shipping Act*

By the beginning of the twentieth century Congress had recognized the need for special legislation to prevent monopolies and unlawful restraints. The Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890 attempted to limit corporate evils such as price-fixing and restrictive agreements. These legislative efforts to prevent abusive practices continued in 1914 with the adoption of the Clayton Act and Federal Trade Commission Act.

It was during this same period of increased interest in freedom of competition that Congress undertook an extensive study into the antitrust problems

rampant in the maritime industry. The Shipping Act of 1916, now administered by the Federal Maritime Commission, was aimed at abuses in both domestic and foreign shipping caused by secret anticompetitive agreements [13] between shippers. Recognizing the beneficial aspects [14] of many agreements, Congress accepted a compromise: in order to participate in cooperative working arrangements shippers would have to submit the arrangements for approval by the federal regulatory agency before implementation.

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[13] These agreements and conferences engaged in price fixing, discriminatory rates, limiting sailings by certain lines or from certain ports, freight volume restrictions, tariff pooling, and assessing fines for assistance to non-conference lines. In addition, they fought outside competition by giving tariff rebates or by using "fighting ships" subsidized by the conference to destroy a single competing line. H.R. Doc. No. 805, 63d Cong., 2d Sess. 281-95 (1914) ("Alexander Report").

[14] It is claimed that the adoption of the first course—the prohibition of cooperative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination.

H.R. Rep. No. 659, 64th Cong., 1st Sess. 28 (1916), *quoting* Alexander Report at 416.

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. . . .

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as ap-

proved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof . . . .

46 U.S.C. § 814 (1970). In this way Congress attempted to preserve general principles of competition without eviscerating efforts of the nation's shipping lines to compete internationally. Although the desired agreements increased the prospects for fair competition within the specialized conditions of the shipping industry, they necessarily violated basic principles of general antitrust laws. Congress therefore created an exemption for approved plans:

Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

46 U.S.C. § 814 (1970).

Numerous Supreme Court cases interpreting section 15 have considered the interaction between the Shipping Act exemption and the antitrust laws. Recognizing the expertise of "an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade," the Court declared that the Shipping Board, predecessor of the FMC, had primary jurisdiction in a case seeking a Clayton Act injunction against un-

approved agreements with alleged antitrust consequences. *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474, 485 (1932). *See also Far East Conference* v. *United States*, 342 U.S. 570 (1952). This concept of primary jurisdiction was defined more narrowly in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), where the Court stressed the limited nature of the antitrust exemption created by the Shipping Act and, distinguishing *Cunard* and *Far East*, held that a suit for treble damages for antitrust violations under an unapproved conference agreement would lie in district court. The Court stressed that since the Commission could approve these agreements only prospectively, awarding treble damages for completed conduct would not interfere with the Commission's future actions. 383 U.S. at 220-22.

In addition to these primary jurisdiction cases, suits involving the proper standards for approving section 15 agreements have led the Court to consider applicability of antitrust principles to Shipping Act concerns. In *FMC* v. *Aktiebolage Svenska Amerika Linien*, 390 U.S. 238 (1968), the Court recounted the historical development of the Act and determined that antitrust violations could serve as a basis for disapproving agreements under the "contrary to the public interest" language added to section 15 in 1961.[14] "Congress has, it is true, decided to confer

[14] "The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair . . . , or to operate

antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose." 390 U.S. at 245. In addition the Court has refused to expand potential antitrust immunity for agreements not clearly covered under section 15's emphasis on on-going arrangements. *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 & n.8 (1973) (acquisition-of-assets agreements).

These cases reveal the Court's acknowledgment of the delicate balance which Congress struck between the national economic policy of fair competition and the specialized needs of the shipping industry. This balance has become even more precarious when the labor factor also must be fitted into the jurisdictional equation.

B. *Labor/Antitrust*

While the paths of antitrust and the Shipping Act policies have sometimes diverged, those of labor and antitrust have consistently collided head-on. In the early years of this century, attempts to organize labor were frequently defeated in the legal forum by application of antitrust laws. *See, e.g., Bedford Cut Stone Co.* v. *Stone Cutters' Association*, 274 U.S. 37 (1927); *Duplex Printing Press Co.* v. *Deering*,

to the detriment of the commerce of the United States, or *to be contrary to the public interest*, or to be in violation of this chapter . . . ." 46 U.S.C. § 814, *as amended*, Pub. L. No. 87-346 (Oct. 3, 1961) (emphasis added).

254 U.S. 443 (1921); *Loewe* v. *Lawlor*, 208 U.S. 274 (1908). This historical animosity resulted from two opposing objectives: antitrust laws sought to promote competition while unions strove to eliminate wage competition through collective bargaining.[15] Congress recognized these objectives and attempted to foster the national objective of collective bargaining[16] by providing a statutory labor exemption in

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[15] The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining.

Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806 (1945).

> Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975).

[16] *See, e.g.*, 29 U.S.C. § 102 (1970):

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint,

the Clayton Act[17] and by regulating the bargaining

> or coercion of employers of labor, of their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[17] The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1970). *See also* 29 U.S.C. § 52. (1970):

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, if any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> And no such restraining order or injunction shall prohibit any person or persons whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or

process through various provisions of the National Labor Relations Act.[18] In addition the courts have developed a nonstatutory labor exemption to the antitrust laws. *See, Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622 (1975).

Beginning with *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 (1940), the Court held that a violent primary sit-down strike did not violate the Sherman

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from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

and 29 U.S.C. § 101 (1970):

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

[18] *See, e.g.*, 29 U.S.C. § 158(b)(4) (regulating union secondary activities); § 158(e) (prohibiting hot cargo clauses).

Act. The broad language[19] of the case limiting the Sherman Act's scope as to price effects of labor negotiations was gradually disavowed, however, as the Court evolved an ad hoc definition for this non-statutory exemption.

Although union picketing and product boycott within a labor jurisdictional dispute were exempt activities,[20] *United States* v. *Hutcheson,* 312 U.S. 219

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[19] Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940) (citations omitted).

[20] So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or un-

(1941), combining with businessmen to create a geographical monopoly benefitting both labor and management was not protected. *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945). While the Court assumed that the bargaining agreements in which the union persuaded employers not to buy goods manufactured by employees not members of its local would not have violated the Sherman Act, the union had also joined in a manufacturer/contractor plan to bar all other business men from New York in order to charge exaggerated prices. This combination was not within the exemption to the antitrust laws.

In 1965 the Court further refined the non-statutory exemption standards. The United Mine Workers forfeited their exemption by agreeing with the large mine owners in a multi-employer unit to impose a certain wage scale on small owners, even though the terms imposed were mandatory bargaining topics. *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). The union (which also had invested in certain mines) had compromised its demands against mechanization and control of working time in order to obtain industry-wide wage increases. The facts showed a pattern of union-owner cooperation to drive small owners out of the coal market. The major defect in the union's behavior was its *agreement* to impose "specified labor standards outside the bargaining unit . . . . For the salient characteristics of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy." *Id.* at 68.

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selfishness of the end of which the particular union activities are the means.

United States v. Hutcheson, 312 U.S. 219, 232 (1941).

In a companion case to *Pennington*, however, the Court upheld a strike-coerced agreement in which the butchers' union obtained the same marketing hours restriction from Jewel Tea Co. that it had negotiated with a multi-employer bargaining group. *Local 189, Amalgamated Meat Cutters & Butcher Workmen* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). Three Justices—White, Warren and Brennan—stressed the fact that the trial court found no evidence of a conspiracy and that, since butchers would be required for night operations, the union's interest in working hours created a legitimate concern in marketing hours as well. *Id.* at 692. Justices Goldberg, Harlan and Stewart, agreed with the result in *Jewel Tea*, but dissented from denial of the exemption in *Pennington*. For these jurists, national labor policy required an exemption for "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act . . . ." *Id.* at 710. Justice Douglas, with whom Justices Black and Clark joined, dissented in *Jewel Tea* on the grounds that the multi-employer collective bargaining agreement was itself evidence of a conspiracy between labor and management to impose marketing terms on other employers. *Id.* at 736.

Just last term the Supreme Court again attempted to define with more precision the landmarks by which bargaining parties and lower courts can find their

way through the obscurities of the labor/antitrust labyrinth. The Court found that a plumbing and mechanical workers union could not obtain its legitimate goal of organizing as many subcontractors as possible by compelling a "stranger"[21] general contractor to agree to use only subcontractors hiring the union's members. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). This direct restraint on competition would eliminate competition based on efficiency and was not a natural consequence of elimination of competition over wages and conditions.[22] *Id.* at 623, 625. While the general contractor had not argued that the union had con-

[21] The union had disclaimed any interest in representing Connell's employees. This factual aspect of the case is highly relevant since the Court determined that section 8(e) of the National Labor Relations Act allows a subcontracting agreement "within the context of a collective-bargaining relationship." 421 U.S. at 627. Even more important is the Court's suggestion that within a collective bargaining setting, labor policies may weigh more heavily.

> There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption *if it were included in a lawful collective-bargaining agreement.*

Id. at 625-26 (emphasis added).

[22] Furthermore, the coercive secondary strike was not subject only to the special remedies of the National Labor Relations Act since the violation at issue related to section 8(e) regarding hot cargo clauses rather than 8(b)(4) limiting secondary activities. *Id.* at 633-35. *Contra, id.* at 639-55 (Stewart, J., dissenting). *See also* St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 627-28 (1976).

spired with organized subcontractors, the Court did observe that a "most favored nation" clause in the multi-employer bargaining agreement "enhanc[ed] the restraint of trade". *Id.* at 625 n.2. It thus appears that the Court has dispensed with the requirement of conspiracy for subjecting union activity to antitrust litigation,[23] at least outside employer-employee bargaining. *See also* 61 CORNELL L. REV. 436, 448 n.63 (1976); 50 TULANE L. REV. 418, 426 (1976).

C. *Labor/Shipping*

We turn now to a series of cases in which the Federal Maritime Commission has attemted to apply the vagaries of labor/antitrust principles to agreements affecting labor relations within the shipping industry.

Prior to 1968, the FMC had resisted the concept that it had jurisdiction under section 15 over agreements affecting employer-employee relationships. The Supreme Court, however, in 1968 overruled the FMC and this court as to the applicability of the Shipping Act's pre-implementation procedures to an agreement *among PMA members* which formulated assessments for the establishment of a $29,000,000 fund that had already been negotiated with the ILWU. *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261 (1968). Despite warning by Justice

[23] The Court held only that the agreement was subject to antitrust litigation, not that it actually violated the Sherman Act. 421 U.S. at 637.

Douglas that this employer agreement, although outside employer-employee negotiation processes, was intimately related to labor relations, *id.* at 296-313, the majority relied on the broad language of section 15 regarding any "cooperating working arrangement" to determine that the FMC had jurisdiction under section 15 to approve, disapprove or modify the agreement, and that the fee assessment also might violate sections 16 and 17. Of particular concern was the disproportionate cost of automobile shipping, a cost passed on to the manufacturer despite the minimal benefit received. *Id.* at 281-82.

The second step leading to the present controversy involved an attempt by the FMC to assert jurisdiction over a labor allocation agreement among members of the multi-employer unit and an employee assignment provision worked out later among employers and then embodied in the collective bargaining agreement. *United Stevedoring Corp.* v. *Boston Shipping Association*, 15 F.M.C. 33 (1971) (hereinafter *Boston I*). On appeal the First Circuit expressed its "astonishment" at the Commission's action and remanded, noting the difference "between attaching a separate, section 15, agreement, in which the union had little interest, to a collective bargaining agreement, and making a multi-employer agreement with a union, eyeball to eyeball, but which, by the very fact that it is multi-employer, has some effect on employer competition." *Boston Shipping Association* v. *FMC*, Civil No. 72-1004 (1st Cir. filed May 31, 1972). The Commission upon remand examined the

labor/antitrust cases and held that the same labor exemption applied to section 15 agreements. *United Stevedoring Corp.* v. *Boston Shipping Association*, 16 F.M.C. 7 (1972) (hereinafter *Boston II*). Although "organic agreements of pure collective bargaining" would never require filing, a line would be drawn "where purely labor matters cease and shipping matters begin." *Id.* at 14. The Commission articulated a four-prong test,[24] no element of which would be controlling, and found that both agreements before it were entitled to the exemption.

The following year the Commission again faced the interplay of labor agreements and shippng concerns. *New York Shipping Association*, 16 F.M.C. 381 (1973). At issue was an assessment formula for funding the fringe benefit program. Both the union and the multi-employer bargaining unit had nego-

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[24] 1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".

2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

United Stevedoring Corp. v. Boston Shipping Ass'n, 16 F.M.C. 7, 13 (1972).

tiated the formula since prior assessment methods worked out by the employers had proven unable to assure fund security. Although the FMC claimed jurisdiction over the assessment formula, it granted interim approval so as not to "jeopardize relations between the NYSA and the ILA." *Id.* at 396. This decision was affirmed by the Second Circuit as merely an extension of the *Volkswagenwerk* holding. *New York Shipping Association* v. *FMC*, 495 F.2d 1215 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974).

These cases have continued to cut ever finer the distinction between "organic collective bargaining agreements" and shipping cooperative arrangements. In the case before us, the FMC was compelled once again to draw the difficult line which reconciles Shipping Act policies with labor policies. *Boston II*, *supra*, 16 F.M.C. at 10. Although we sympathize with the Commission's herculean task of following "the rather imprecise guidelines of *Volkswagen*," *id.* at 11, while avoiding intrusion into "the already strife-ridden maritime labor world," *id.* at 10, we do not believe that asserting jurisdiction under section 15 over the collective bargaining agreement before us is within the mandate of *Volkswagenwerk* or the structure of the Shipping Act.

III. Resolution of the Issue

As the three lines of cases summarized above illustrate, application of the Shipping Act to collective bargaining agreements affecting emloyers outside the bargaining unit requires reconciliation of

conflicting policies. We must, whenever possible, draw the line between shipping, labor and antitrust concerns in such a way that each statutory scheme remains effective."[25] In this case we believe that the jurisdictional boundary drawn by the FMC impinges unnecessarily upon collective bargaining processes. The FMC, recognizing the need for this balancing, has attempted to distill the essence of the judicially-developed antitrust exemption for labor and apply it to the Commission's jurisdictional bases in sections 15, 16 and 17. Were the procedures of section 15 the same as those of the antitrust laws we would agree that the transplanted exemption might well serve the aim of statutory reconciliation. The unique structure of the Shipping Act, however, makes this an unsatisfactory solution in several ways.

Unlike the antitrust laws, section 15 prescribes a procedure whereby agreements subject to the Act must be filed with the Commission *before implementation*. The legislative scheme is a sound one for assuring that agreements among carriers which fix rates, pool earnings, allocate ports, or limit traffic[26] must be approved or modified by the agency with an expertise in shipping matters. As the legislatively

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[25] "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." Radzanover v. Touche Ross & Co., 44 U.S.L.W. 4762, 4764 (U.S. June 7, 1976, *quoting* Morton v. Mancari, 417 U.S. 535, 551 (1974).

[26] 46 U.S.C. § 814 (1970), which appears *supra* in the text at 10-11.

established regulator of maritime concerns, the Commission needs authority to postpone the effective date of such agreements pending full examination of their impact on the entire industry. The Federal Maritime Commission, however, is not in any way the congressional choice of regulator for labor relations within the shipping industry. In contrast, as pointed out by Justice Douglas in *Volkswagenwerk*, the Maritime Labor Board created in 1938 was allowed to expire, and Congress has consistently refused to provide a specialized federal maritime labor agency. 390 U.S. at 299-301 (Douglas, J., dissenting). Subjecting negotiated labor agreements to filing and approval (or disapproval or modification) would place collective bargaining units in the shipping industry under more stringent federal regulation than other transportation industries and thus at a competitive disadvantage.

One obvious disadvantage to maritime labor of the FMC ruling is that the ruling would make nearly impossible the maintenance or prompt restoration of industrial peace. The history of Pacific Coast longshoremen bargaining is a story of great unrest. Continual "quickie strikes" during the 1930's and coastwide shutdowns lasting several months in the 1940's were destructive to labor and management alike. *See* C. LARROWE, SHAPE UP AND HIRING HALL ch. 4, 83-138 (1955). The nature of collective bargaining as it exists in this country today requires the ability of both sides to implement promptly the compromise agreements worked out in eleventh-hour bargaining sessions or, as in this case, in hard-fought negotia-

tions following a strike and mediation. The facts of this case are illustrative of the problem: a labor agreement negotiated in 1972 and refined in 1973 has yet to be put into effect more than four years later. The problem is not one of dilatory agency action[27] or judicial backlog, but of procedures unsuited to collective bargaining. Labor peace, a national objective, can not be furthered when the bargaining parties realize that their compromise solutions may be rejected in toto or, even worse, in a piecemeal fashion by a federal regulatory agency whose primary concern is to foster trade competition.

> Frustration of the collective bargaining process comes not so much from the possibility that one or more provisions in a collective bargaining pact might be found illegal at some future date under the antitrust laws, or other statutes such as §§ 16 and 17 of the Shipping Act, but rather from the undue and possibly lengthy freezing or stultification of solutions to troublesome labor problems . . . .

Volkswagenwerk, *supra*, 390 U.S. at 312 (Douglas, J., dissenting).

In *New York Shipping Association*, *supra*, the FMC attempted to offset this disadvantage by granting a temporary approval of the assessment formula found to be within section 15 jurisdiction:

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[27] The Commission points out that PMA neither requested interim approval nor an expedited hearing. In fact, PMA and ILWU obtained extensions of time for filing briefs. FMC Memorandum of March 8, 1976, at 9 n.8.

> Labor peace is crucial to the well-being of our maritime industry, and we will take an action which disturbs the peace only when there are no other reasonable alternatives. Here, however, the course is clear, we will grant the assessment formula an interim approval . . . and we will condition our approval upon any adjustments which may be found necessary as a result of the proceeding which we have this day instituted [to determine if the agreement violates sections 16 and 17].

16 F.M.C. at 396. While such temporary approvals appear to alleviate partially the problem of delayed implementation, they would not solve the problem entirely. The power of the Commission to grant interim approval is currently being litigated. *Marine Cooks & Stewards Union* v. *FMC*, No. 75-2012 (D.C. Cir.). Even if this power is affirmed by the court, interim approval does not remove the possibility of later unilateral modification by the Commission and the resultant specter of a final agreement in which the delicate balance struck by the competing interests of labor and management is upset by partial invalidation of the collective bargaining terms.[28]

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[28] Another technique considered by the Commission was the recommendation of Hearing Counsel and the Department of Justice to exempt collective bargaining agreements from section 15 by means of a rulemaking proceeding. *Boston II*, *supra*, 16 F.M.C. at 15. Despite a promise that "[t]his we intend to do," no rulemaking has been forthcoming. Instead, the Commission has appeared to expand its claim of jurisdiction in *New York Shipping Association* and the case before us. *See* Pacific Maritime Ass'n, Doc. No. 72-48 (FMC, Jan. 30, 1975), J.A. at 533 n.20 (Morse, Comm'r, dissenting).

Section 15 jurisdiction also differs from antitrust procedures as to the penalties imposed. Bargaining agreements found to be outside the antitrust exemption face treble damages, no small deterrent to parties which stray too near the nebulous border between legitimate bargaining and Sherman Act violations. Nevertheless, the penalty reflects the actual damages suffered, though multiplied in the reflection. In contrast, Shipping Act penalties may fall numerous times upon bargaining contracts. Under section 15 *failure to file* a covered agreement may result in a $1,000 per day fine. In addition, a civil penalty of $5,000 per day may be assessed for each violation of the provision against *discriminatory practices*, 46 U.S.C. § 815 (Supp. 1974), or *discriminatory rates*, 46 U.S.C. §§ 815, 831(a) (Supp. 1974). With FMC lightning threatening to strike twice in the same agreement, carrier employers[29] would no doubt err in favor of filing all agreements with potential anticompetitive results, thus further disrupting the course of negotiations. This is particularly true since the FMC, in recognizing the complexities of the labor/antitrust exemption, has stated that its four criteria are merely rules of thumb, that failure to meet any

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[29] The FMC appears to be claiming jurisdiction over the agreement, but not over the union as a "common carrier by water or other person subject to this chapter." 46 U.S.C. § 814 (1970); FMC Memorandum, *supra* at 8 n.7. *See also* note 31 *infra*; *cf.* Pacific Maritime Ass'n, Doc. No. 72-48 (FMC, Jan. 30, 1975), J.A. at 533 n.19 (Morse, Comm'r, dissenting) ("ILWU is clearly neither of the described type of persons.").

one of them *might* result in denial of the exemption, and that the determination will be made on a "case-by-case ad hoc basis." *See, e.g., Boston II, supra,* 16 F.M.C. at 12; *New York Shipping Association, supra,* 16 F.M.C. at 390; and *Pacific Maritime Association,* Doc. No. 72-48 (FMC Jan. 30, 1975), J.A. at 522.

Such burdens should not be imposed lightly by either the Commission or the courts, particularly since congressional direction in the statute does not clearly require this result. The Supreme Court's decision in *Volkswagenwerk* construed section 15's definition of agreements broadly, stressing that the Alexander Report [30] intended government scrutiny of "the myriad of restrictive agreements". 390 U.S. at 276. That agreement, however, was one *among employers*: common carriers, stevedoring contractors, and marine terminal operators.[31] The Court rejected

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[30] *See* text at note 12 *supra.*

[31] An argument was made in *Volkswagenwerk* that the agreement was not within the statutory definitions of section 15 which covers agreements between "every common carrier by water, or other person subject to this chapter" and "another such carrier or other person subject to this chapter." *See* Volkswagenwerk Aktiengesellschaft v. FMC, 371 F.2d 747, 752 (D.C. Cir. 1966). Section 801 provides in relevant part:

> The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

46 U.S.C. § 801 (1970). The Commission assumed that both PMA and Marine Terminals Corporation were covered by the

the argument that filing of this separate employer contract would unjustifiably impinge upon labor concerns. The union had a substantial interest in setting the amount of the mechanization fund established by collective bargaining, but had agreed to leave to the association the method for assessing members their share of the cost. The Court cautioned, however, that

> [i]t is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. *We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in*

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definition, but denied section 15 jurisdiction over the agreement. In reversing, the Supreme Court was silent on the issue. This silence may reflect an acceptance of the FMC assumption of coverage or the theory later propounded by FMC that the presence of a non-covered party in the agreement does not destroy jurisdiction *over the agreement. See* New York Shipping Ass'n, 16 F.M.C. 381, 388-89 (1973), *aff'd sub nom.* New York Shipping Ass'n v. FMC, 495 F.2d 1215, 1220 (2d Cir. 1974). *Contra* United Stevedoring Corp. v. Boston Shipping Ass'n, 16 F.M.C. 7, 17-21 (Morse, Comm'r, concurring and dissenting).

this opinion is to be understood as questioning their continuing validity.

390 U.S. at 278 (emphasis added). To expand the holding in *Volkswagenwerk* to cover an agreement *negotiated between union and management* is to ignore the caveat of the Court and the legislative history of the Act. Although the Shipping Act did not pre-date collective bargaining in the maritime industry,[11] no mention of labor agreements appears in the discussion of problem agreements to be regulated by the federal agency. Instead, the Alexander Report stresses the need for supervision of "all agreements or arrangements which steamship lines may have entered into *with other steamship lines, with shippers, or with other carriers and transportation agencies.*" Alexander Report, *supra* at 418 (emphasis added).

We are, of course, aware that our holding in this case creates a barrier between FMC jurisdiction over labor-related agreements, as in *Volkswagenwerk*, and labor-management negotiated agreements. Justice Harlan, who foresaw the problem in his concurring opinion in *Volkswagenwerk*, felt that a labor agreement could raise both labor and shipping concerns. 390 U.S. at 291 n.7. He also recognized, however,

[11] For example, unionization among New York longshoremen was sufficient in 1874 to organize a five-week strike seeking higher wages. By 1914, New York locals united within the International Longshoremen's Association and, by 1916, the ILA secured a port-wide agreement. Similarly on the West Coast, an agreement obtaining wage increases from all Seattle area employers was signed in 1915. C. LARROWE SHAPE-UP AND HIRING HALL, chs. 7-9, 87-89 (1955).

that reconciling multi-employer collective bargaining and regulation of shipping competition is a problem of line-drawing. Judicial line-drawing is always a difficult task, and in areas of converging statutory schemes the differences between cases on either side of the line may be muted by the similarities. An argument can be made, undoubtedly, that a separation is arbitrary which permits the FMC to oversee employer agreements intended to fulfill a collective bargaining obligation but denies this approval procedure for the bargaining agreement itself. While we might prefer a rule that more adequately protects labor negotiations from the very real, if more distant, interference permitted in *Volkswagenwerk*, we see no valid purpose in extending that rule to encourage immediate disruption of negotiations. Exempting collective bargaining agreements as a class from section 15 is the best method to reconcile these conflicting labor and shipping objectives.

Even if we were to adopt the balancing test suggested by Justice Harlan, the agreement at issue would be exempt from filing. The agreement challenged in *Volkswagenwerk* assessed fees to employers on the basis of tonnage handled, tonnage being determined by weight or measurement depending upon the manifesting custom for each type of cargo. Almost all the employers passed these costs on to their customers, thus causing the assessment to fall disproportionately on shippers who transported automobiles by nonmember charter and common carriers. In this way, the agreement produced discriminatory

tariffs—a primary concern of the Act—for the shipping of automobiles.[33]

In contrast, Supplemental Memorandum of Understanding No. 4 is challenged not because it will compel discriminatory rates, but because it will allegedly force nonmembers into accepting the same wage, fringe benefit and work stoppage terms as those negotiated by the multi-employer unit. Although the parties vigorously dispute the proper interpretation of the terms of Supplemental Memorandum No. 4 and the subsequent Revised Agreement,[34] as well as the intent[35] of the parties to the agreement, the

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[33] *Compare* New York Shipping Ass'n v. FMC, 495 F.2d 1215, 1220 (2d Cir. 1974) in which the union-labor agreement involved an assessment formula. While we agree with the Second Circuit that the contents are like those of the *Volkswagenwerk*, we cannot accept the conclusion that active negotiation of the agreement by the union is "a distinction without a difference." 495 F.2d at 1220. Unlike the Second Circuit we face not only a different type of agreement, *cf. id.* at n.11, but one which has been stalled for several years by FMC action.

We note also that, while the agreement in *New York Shipping* is similar in terms to one over which this court assumed jurisdiction, *see* Transamerican Trailer Transport, Inc. v. FMC, 492 F.2d 617 (D.C. Cir. 1974), the *Transamerican* decision involved the agreement between employers, not that negotiated between union and the multi-employer unit.

[34] The parties disagree, for example, as to whether the agreement compels identical terms on all bargaining topics, whether labor is available outside the joint hiring hall, and whether the union has agreed to impose PMA/ILWU terms on all nonmember employers.

[35] *Compare* Affidavits of Alex Parks, Counsel for Intervenor Ports, and Milton Mowat, Manager, Port of Portland, J.A. at 85-125 *with* Affidavit of Edmund Flynn, PMA President,

nonmembers' argument boils down to an accusation that they are being forced against their wills into a multi-employer unit. FMC has thus accepted jurisdiction to determine shipping implications of an agreement which perhaps imposes an improper bargaining unit. We do not believe that the Shipping Act pre-implementation approval provision was intended to cover problems so clearly within the realm of National Labor Relations Board expertise. The NLRB practice of certifying multi-employer bargaining units has been approved by the Supreme Court in general[36] and for the maritime industry in particular.[37] Similarly, there can be no question that the NLRB has more experience in interpreting contested bargaining terms than the FMC. At worst the case presents *Pennington* considerations. *See* text at notes 20-21 *supra*. These labor issues do not, of course, automatically assure NLRB exclusivity. A divided Supreme Court has ruled against primary jurisdiction in the NLRB for anticompetitive agreements. *See Connell Construction*, *supra*, 421 U.S. at

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and Fred Huntsinger, ILWU Negotiator, J.A. at 169-211, 216-18.

[36] Congress intended "that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future."

NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957), *quoted in* Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 283 (1968).

[37] 353 U.S. at 94.

633-34; *Jewel Tea, supra*, 381 U.S. at 685-88. While the Court recognized the expertise of the NLRB on matters such as determining whether certain negotiating topics were mandatory, it believed that the ultimate question of whether antitrust policies overrode collective bargaining objectives was properly one *for the judicial process*. In noting the strong labor considerations involved in the case before us we are not advocating exclusive jurisdiction for the NLRB; rather we are removing from the FMC the "primary jurisdiction" inherent in the pre-approval system of the Shipping Act for labor agreements concerned with uniform fringe benefits and work stoppage policies. We agree with the Supreme Court that courts, and not labor or shipping agencies, are best suited to balancing the conflicting interests of the acts which these agencies must enforce. In the case *sub judice*, antitrust cases raising identical claims are the proper forums for resolution of the issue. *See* note 11 *supra*.

In rejecting section 15 jurisdiction over these agreements, we do not insulate them from the antitrust laws or from FMC scrutiny. As the Court has frequently observed, "[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Pennington, supra*, 381 U.S. at 665.

Despite the inappropriateness of section 15 procedures for collective bargaining agreements, shipping concerns are clearly evident in the possibility that the *actual implementation* of the agreement will re-

sult in discriminatory practices or rates against the complaining ports. The concept of section 15 jurisdictional prerequisites different from those of sections 16 and 17 is not novel. The Act itself provides for FMC consideration of individually-imposed discriminatory rates and practices as well as approval of inter-carrier agreements. Although the FMC must assure facial compliance with sections 16 and 17 before approving submitted agreements under its mandate to disapprove agreements "in violation of this chapter," it has continuing jurisdiction over approved agreements [35] to ensure that implementing practices do not violate the prohibitions against discriminatory rates and practices. 46 U.S.C. § 814 (1970). *See also Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 65 (1970); Memorandum of Law of Hearing Counsel, Doc. No. 72-48 (FMC, Dec. 15, 1972), J.A. at 74.[36] Justice Douglas, dissenting in *Volks-*

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[35] "The Commission shall . . . disapprove, cancel or modify any agreement, . . . *whether or not previously approved by it*, . . . in violation of this chapter . . . ." 46 U.S.C. § 814 (1970) (emphasis added).

[36] Should these various collective bargaining agreements be found lawful by the courts despite the *Pennington* case, we submit, and the parties carry out specific practices which may unduly prejudice the ports or cargo in violation of section 16, or may constitute unreasonable practices under section 17 of the Shipping Act, Shipping Act concern may become substantial and the obligations of members of the PMA under the Shipping Act (and also the ILWU as "any other person" under section 16) may have to be determined by the Commission.

J.A. at 74.

wagenwerk, recognized potential FMC jurisdiction under sections 16 and 17 for practices growing out of an agreement that might be exempt from filing under Section 15. 390 U.S. at 314. Although Justice Harlan's separate concurrence rejects this suggestion, *id.* at 285-86, his opinion, and that of the majority, acknowledges the difference between "labor agreements" and "labor-related agreements" and that the difficult line-drawing involved in these cases depends upon the type of agreement involved.

FMC jurisdiction under sections 16 and 17 must still accommodate labor concerns and the exemption borrowed from antitrust law would appear to be the proper limit on that jurisdiction. Unlike the prior approval strictures of section 15, sections 16 and 17 impose penalties after-the-fact and do not interrupt industrial peace by forbidding or postponing implementation of collective bargaining terms. Like the antitrust laws, they protect the shipping industry from predatory rates and practices and are thus suitable tools for controlling Shipping Act violations which result from labor-management conspiracies.

Because the FMC order before us is a finding of jurisdiction under section 15 only, we need not determine at this time whether the *Boston II* four-prong test accurately reflects the labor/antitrust exemption carved out by the Supreme Court. We would caution the Commission, however, that parsing the Court decisions in this highly complex area may over-simplify the balancing process required and create a legal conundrum in which the total exemption is still greater than the sum of its parts.

In resolving the narrow issue before us, we have not ignored the antitrust/shipping overlap that our decision will create. Labor agreements not subject to section 15 approval may not obtain the benefit of the antitrust exemption provided in that section. *See generally Carnation Co.* v. *Pacific Westbound Conference, supra. See also Volkswagenwerk, supra,* 390 U.S. at 274 n.20 ("Any agreement subject to § 15 filing that is not both filed and approved is not only illegal under § 15 but also subject to attack under the antitrust laws.") These agreements could thus be in violation both of sections 16 and 17 and of the antitrust laws, even though shipping considerations might outweigh the general applicability of Sherman Act principles. The *Cunard-Carnation* line of cases reveals a judicial willingness to defer to the expertise of the FMC within the limited antitrust exemption created. We are confident that, when the issue is presented squarely, the established principles of reconciling competing statutes will guide the courts in carrying out the objectives of both. Whether this is best accomplished through the doctrine of primary jurisdiction,[40] through creation of a nonstatutory exemption for shipping as was done for labor,[41] or through allowing injured parties the choice of remedies[42] is not required by the posture of the case before us.

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[40] *See* text at notes 12-14.

[41] *See* text at notes 15-23.

[42] *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224 (1966).

IV. Conclusion

Like the holdings in the three lines of cases summarized above, this case must turn finally on a matter of linedrawing. We believe that the facts of this case clearly distinguish themselevs from *Volkswagenwerk* and thus require a different result. Agreements between labor and management, while subject to antitrust and shipping legislation, cannot be fitted into the pre-implementation approval procedures of section 15 without ignoring the national policy fostering industrial peace through collective bargaining. We therefore reject the finding of FMC jurisdiction under section 15 and the case is hereby remanded to the Commission for further proceedings consistent with our opinion.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 75-1140

PACIFIC MARITIME ASSOCIATION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION PORTS OF ANACORTES, ET AL., INTERVENORS

No. 75-1215

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of an Order of the Federal Maritime Commission

Before: WRIGHT, McGOWAN and TAMM, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Federal Maritime Commis-

sion and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the Federal Maritime Commission for further proceedings, consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court
George A. Fisher
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Date: August 27, 1976
Opinion for the Court filed by Circuit Judge Tamm.

APPENDIX C

FEDERAL MARITIME COMMISSION

Docket No. 72-48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

The ILWU-PMA Nonmember Participation Agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union is subject to the jurisdiction of the Federal Maritime Commission under section 15 of the Shipping Act, 1916.

The ILWU-PMA Nonmember Participation Agreement is not "labor exempt".

Thomas J. White, Norman E. Sutherland, Alex L. Parks, Manley B. Strayer, Cleveland C. Cory, and *Gary R. Bullard* for Petitioner Ports.

Edward D. Ransom and *Robert Fremlin* for Pacific Maritime Association.

Norman Leonard for International Longshoremen's and Warehousemen's Union.

Thomas N. Gleason for International Longshoremen's Association.

Gerald Grinstein, Michael P. Crutcher, Louis F. Nawrot, Jr., Robert A. Koelker, and *Richard F. Ford* for Port of Seattle.

Francis Scanlan and *C. P. Lambos* for North Atlantic Shipping Association.

Paul J. Kaller and *Donald J. Brunner* as Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; James V. Day, *Vice Chairman*; Ashton C. Barrett and George H. Hearn, *Commissioners*)

Background

This proceeding was instituted to determine whether a master collective bargaining contract and a Supplemental Memorandum of Understanding No. 4 (SMU 4), entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU), embody any agreements between and among the members of PMA which are subject to the requirements of section 15 of the Shipping Act, 1916 (the Act); whether the implementation of these contracts by the PMA and the ILWU would result in any practices which are violative of sections 16 and 17 of the Act; and finally, whether there are any labor policy considerations which would operate to exempt such agreements or practices from any provision of the aforementioned sections of the Shipping Act, 1916.

The Commission's investigation was initiated at the request of the petitioner ports,[1] who maintain

[1] The Ports of Anacortes, Bellingham, Everett, Grays Harbor, Olympia, Port Angeles, Portland and Tacoma.

that the subject agreements, providing for the employment of longshore labor, are "agreements" within the meaning of section 15 of the Act, which should have been filed for Commission approval pursuant to that section.

On October 19, 1972, the Commission issued its First Supplemental Order Severing Jurisdictional Issues. In that Order, the Commission decided to determine separately the matter of its jurisdiction under section 15 over the subject agreements. Additionally, the Commission advised therein that it would consider whether any labor considerations would operate to exempt those agreements or the practices resulting therefrom from the provisions of sections 15, 16, and 17 of the Act.

Thereafter, petitioner ports submitted a revised version of the SMU 4, entitled "ILWU-PMA Nonmember Participation Agreement", which was made part of the collective bargaining agreement under consideration in this proceeding. In its Second Supplemental Order Consolidating Jurisdictional Issues, served January 30, 1974, the Commission found that the "ILWU-PMA Nonmember Participation Agreement",[2] was the same in all its substantive essentials

[2] For the sake of convenience we will refer to the ILWU-PMA Nonmember Participation Agreement as the Revised Agreement. The Revised Agreement, like its predecessor SMU 4, requires that: (1) nonmembers join the PMA for an indefinite period as a condition to the direct employment of any member of the joint PMA-ILWU work force; (2) any separate contract with ILWU conform to the provisions of the Revised Agreement and the Pacific Coast Longshore and Clerks Agree-

as the SMU 4, ". . . the only difference between the two being that the revised agreement was embodied in the master collective bargaining agreement between the PMA and ILWU." [3] The Commission pro-

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ment; (3) nonmembers employ members of the joint work force only through PMA allocation procedures and the ILWU-PMA dispatching halls; (4) nonmembers pay dues and assessments and accept proportional liability as to obligations of the PMA; and (5) nonmembers adhere to PMA decisions as to work stoppages, strikes and lockouts.

[3] PMA takes issue with the Commission's statement that "the only difference" between SMU 4 and the Revised Agreement is that the latter "is embodied in the master collective bargaining agreement". PMA believes that this language may create the false impression that "there was some difference in treatment of the nonmember participation agreement in 1973 by PMA and ILWU in order to avoid FMC jurisdiction over the agreement." PMA, in order "to dispel any notion" which may arise from the Commission's statement, point out that while the Revised Agreement was physically incorporated into the 1973 master collective bargaining agreement whereas SMU 4 was simply made a supplement to the 1972 master collective bargaining agreement, the agreements are not at all unlike since both form part of their respective master collective bargaining agreements.

While we do not share PMA's concern that the challenged language in our Second Supplemental Order may create misleading impressions, in order to allay PMA's fear and to avoid any further misinterpretation, we wish to state on the record that we have never doubted that either SMU 4 or the Revised Agreement was part of the master collective bargaining agreement in effect at the time, nor was it our intention to question the parties' motives in treating the two agreements differently. In fact, however, PMA's apprehension is nonconsequential since either method of incorporation has the same effect. It is the substance, and not a change in form, of the agreement with its corresponding impact upon employers in the industry that concerns the Commission.

posed, therefore, to (1) grant the supplemental petition of the petitioner ports, and (2) include the "ILWU-PMA Nonmember Participation Agreement" in the current deliberations rising out of the First Supplemental Order. In order to accord every possible due process, parties were afforded an additional opportunity to address themselves to these actions by the Commission. The comments submitted in response thereto have been fully considered by the Commission and found, for reasons stated below, not to dissuade us from our earlier views.

Before addressing ourselves to the jurisdictional question at issue here, we should first like to dispose of a preliminary matter raised by Hearing Counsel. Hearing Counsel have suggested that because the master collective bargaining agreement, including the Revised Agreement, "involve antitrust and related labor policies" and require a determination of whether parties engaged in collective bargaining have exceeded the scope of legitimate bargaining, the Commission should defer jurisdiction to either the NLRB or the courts and await their decision. If the agreements are found lawful, Hearing Counsel would then have the Commission examine the implementation of the agreements in the light of sections 16 and 17 of the Act.

As we noted in *New York Shipping Association —NYSA-ILA Man-Hour/Tonnage Method of Assessment; Possible Violation of Sections 15, 16 and 17, Shipping Act, 1916*, 16 F.M.C. 381, 397-398 (1973), the matter of deferring the legality of a bargaining

agreement to the exclusive primary jurisdiction of the NLRB was presented to, and disposed of by, the Supreme Court in *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). In *Jewel Tea*, it was alleged that the union and other retail stores had conspired to prevent the retail sale of meat before 9:00 a.m. and after 6:00 p.m. The prohibition was contained in a collective bargaining agreement, and the question of the "labor exemption" from the antitrust laws was presented. The union attacked the appropriateness of the District Court's jurisdiction on the ground that the controversy was within the exclusive primary jurisdiction of the NLRB. The Supreme Court rejected this contention on the ground that the NLRB jurisdiction was primarily restricted to the policing of the collective bargaining process and was not concerned with the substantive merits of the agreement once it was signed. As it was in the *New York Shipping* case, this holding is dispositive of the suggestion made here that we defer jurisdiction over the Revised Agreement to the NLRB.

Before us is a complaint that alleges not that the parties have refused to bargain, but rather that they have entered into an agreement in violation of the shipping and antitrust laws. As a result, the NLRB is without "available procedure" to investigate the legality of the "ILWU-PMA Nonmember Participation Agreement".[4] This Commission, however, has

[4] See discussion of Supreme Court on this point in *Meat Cutters Union* v. *Jewel Tea Co., supra,* at page 687.

been vested with authority over the approvability of this agreement and the exercise of such authority is consistent with the principle of primary jurisdiction as acknowledged by the Court in the *Jewel Tea* case that preliminary resort should be had to the agency which administers the statutory scheme in order to protect the integrity of that scheme. See *Port of Boston Marine Terminal Assn., et al.* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970).

Hearing Counsel's alternate suggestion that the Commission defer the present matter to the courts is equally without merit. Since the Commission has already intervened in the counterpart District Court case and requested that court to stay its proceeding therein, which it has done, until the Commission has had an opportunity to pass upon the status of pertinent agreements under the Shipping Act, it would be both inconsistent and counterproductive for us to now ask that the matter be litigated before the court. More importantly, we believe that consideration of the Revised Agreement in light of the requirements of the Shipping Act is a legitimate concern of this Commission and one that is properly before us. The Commission simply cannot defer to the courts matters which are so intricately involved with its responsibilities under the shipping statutes. As we said in *United Stevedore Corp.* v. *Boston Shipping Association,* 16 F.M.C. 7 (1972), when establishing the applicable criteria, a labor-related agreement:

> . . . must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

Accordingly, we believe that under the circumstances this would be an inappropriate case for the Commission to withhold its determination out of deference to the "expertise" of either the NLRB or the courts. With this in mind, we proceed with a discussion of the jurisdictional issues involved.

Initially, Respondent PMA and Intervenors ILWU and CONASA [5] raised the same objections to the Commission's jurisdiction over the parties to the master collective bargaining agreement as were advanced by NYSA in *New York Shipping*, *supra*. Specifically, these parties contend that: (1) since PMA is an association with some members who are not "common carriers" or "other persons subject to this Act", and (2) since one of the parties to the collective bargaining agreement is a labor union, the Commission has no jurisdiction over the agreement.

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[5] For the sake of convenience, PMA, the ILWU and the Council of North Atlantic Shipping Associations (CONASA) will hereinafter be collectively referred to as "Respondents".

These arguments were not only laid to rest by this Commission in our decision in the *New York Shipping* case, *supra*, but also rejected by the court in *NYSA* and *ILA* v. *FMC*, 495 F.2d 1215 (2nd Cir. April 8, 1974), cert. denied. —— U.S. —— (October 29, 1974). In supporting the Commission's jurisdiction over a multiemployer bargaining association and the agreement entered into among its members, the court there stated:

> We find the merits considerably less difficult than the issue of reviewability; indeed, given the decision in *Volkswagenwerk* [390 U.S. 261 1968)], we see no need for making such heavy weather on the subject as the Commission did. [Footnote omitted.]
>
> The assessment agreement fits the definition of § 15 since it imposes obligations on common carriers by water and other persons subject to the Shipping Act, to wit, terminal operators, see 49 U.S.C. § 801. An agreement to which such persons are parties is not taken out of § 15 by the fact that persons not fitting that definition, to wit, stevedoring contractors who are not terminal operators, are also bound. *Volkswagenwerk* established that an agreement among water carriers, stevedoring contractors and terminal operators allocating assessments for benefits negotiated with a longshoremen's union requires approval under § 15. The FMC took jurisdiction of T-2390, the predecessor of the present assessment formula, apparently without objection, and directed certain modifications; its action has been sustained, without any suggestion that the FMC

lacked jurisdiction over the agreement, in a comprehensive opinion by the District of Columbia Circuit, *Transamerican Trailer Transport, Inc.* v. *FMC, supra.* The petitioners urge that the present case is distinguishable on the basis that the agreements in *Volkswagenwerk* and *Transamerican Trailer Transport* were solely among stevedoring contractors, terminal operators and carriers, while the ILA took an active part in negotiating and is a party to the agreement here at issue. This is a distinction without a difference. To be sure, the FMC has no concern with so much of the agreement as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters. But even though we fully accept that the ILA has an important stake in the existence of a workable and reliable assessment formula, this does not relieve the FMC of its duty to determine whether the formula is reasonable in its effects on shipping. That inquiry is just as important as under the predecessor agreement and under the agreement in *Volkswagenwerk.* (Id., pages 27, 35-36)

Further, we find that the Revised Agreement before us is factually substantially similar to the assessment agreement which the Supreme Court found subject to section 15 in *Volkswagenwerk* v. *FMC, supra.* Consider the parallels. In *Volkswagen*: (1) the ILWU and the PMA had laboriously negotiated on the establishment of the Mech Fund, which, in part, liberalized the union's fringe benefit program, (2) the only interest of the ILWU was to insure that

payments were made into the fund, and (3) the PMA wanted to reserve to itself how the payments were computed and the ILWU left that to PMA. Here, (1) PMA and the ILWU have stated on the record that they have over a period of years negotiated a program of fringe benefits and that this program was supported by the payments of both members and nonmemebers of the PMA, (2) the only interest of the ILWU is allegedly to assure that all industry users of ILWU labor made payments into the fringe benefit fund, and (3) PMA wants to reserve to itself all control of industry users of labor.

In spite of these obvious similarities, Respondents here contend that the rationale of the *Volkswagen* case is inapplicable here because the assessment agreement under consideration in *Volkswagen* was exclusively concerned with "the relationship between association members and their customers", while SMU 4 and its successor, the Revised Agreement, involve matters of fundamental concern to the union and its members.*

Whatever be the merits of this argument, PMA itself readily admits that the purpose of the supplemental agreement is to do away with the "free ride" previously enjoyed by Petitioners and other similarly situated ports and to place nomembers on the same

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* Petitioners, however, continually allude to the lack of any "legitimate" interest of the ILWU in the PMA's attempt to control the "competition between members and nonmembers".

"competitive" basis as members of the PMA. In short, the effect of the Revised Agreement is to control or affect competition between members and nonmembers.[7] Section 15 of the Shipping Act specifically subjects to Commission jurisdiction all agreements between persons subject to the Act which control, regulate or prevent competition.[8] Thus, we conclude that the Revised Agreement must be filed for Commission approval unless it is entitled to a "labor exemption".[9] For reasons stated below, we find that the Revised Agreement is not entitled to such an exemption.

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[7] In response to our Second Supplemental Order, all the parties to this proceeding have incorporated by reference their remarks concerning SMU 4 and have asked the Commission to apply them equally to the Revised Agreement. Consequently, we have substituted the term "Revised Agreement" wherever an argument was used with reference to SMU 4.

[8] PMA, for example, would bind nonmembers to PMA "lockouts", thus preventing a nonmember from continuing operations while members' facilities are shut down.

[9] Seattle has presently petitioned for severance and stay from this proceeding all issues relating to the master collective bargaining contract except for the Revised Agreement. Because the Revised Agreement is different in operation from the remaining sections of the collective bargaining contract, Seattle maintains that the latter is immaterial to the Commission's concern, especially since it raises issues already decided by the NLRB. (See *ILWU, et al., and California Cartage Company, et al.*, 208 NLRB No. 124 (February 15, 1974), wherein the NLRB found a substantial portion of the master collective bargaining contract unlawful.) As heretofore mentioned, because there are involved in the National Labor Relations Act and the Shipping Act, 1916 (the Act) two different purposes, it would not necessarily follow that a

The nature and scope of the so-called "labor exemption" from the antitrust and shipping laws have been considered and discussed at considerable length by the Commission in its decision in *Boston Shipping*, *supra*. In that case the Commission, in reviewing three labor-related agreements, applied doctrines of law which had evolved through the courts in a number of cases arising under the antitrust laws. Recognizing the judicially-accepted principle that the fruits of collective bargaining are generally excepted from the application of the antitrust statutes, the Commission explained therein that:

> The "labor exemption" originated in the area of accommodation of the labor laws and the antitrust laws. To preclude the application of the antitrust laws to various collective bargaining agreements entered into between labor and management, the courts carved out of the antitrust laws a "labor exemption", by means of which such agreements were held to be immune from attack under antitrust laws. Thus, the analogy to a "labor exemption" from the shipping laws is obvious. (16 F.M.C. 11)

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holding under NLRB concepts would be equally applicable to our responsibilities under the Act. Consequently, while we can agree with Seattle that the Revised Agreement within the collective bargaining contract is the *only* agreement among and between members of PMA having section 15 ramifications, there still remains the question of the legality of the agreements among and between members of PMA under sections 16 and 17 of the Act. For this reason, we are denying Seattle's petition. For purposes of this interlocutory proceeding, however, we are hereinafter limiting our discussion solely to the Revised Agreement.

In determining whether labor-related agreements are subject to the provisions of the Shipping Act, 1916, or "labor exempt", the Commission has advised that just as in the courts' accommodation of the labor laws and the antitrust laws, it would proceed on an ad hoc case-by-case basis and apply "the various criteria" evolved in the courts as guidelines or "rules of thumb" for each factual situation. As detailed in the *Boston Shipping* case, these criteria are as follows:

> 1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".
>
> 2. The matter is a mandatory subject of bargaining, e.g., wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.
>
> 3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
>
> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

Failure of an agreemnt to meet any one of these criteria is sufficient to consider withholding a labor exemption. As we explained in the *Boston Shipping* case, "[t]hese criteria are by no means meant to be exclusive nor are they determinative in each and every case." (16 F.M.C. 12)

There is considerable factual conflict among the affidavits from officials of various organizations and purported "notes" taken at PMA meetings as to whether the Revised Agreement was the simple product of, as PMA asserts, "eyeball to eyeball" good faith bargaining or, as contended by Petitioners, was insisted upon by PMA "as a part of its longrange program to force all persons and entities utilizing longshore labor to join PMA as a member and to subcribe to and follow PMA's labor policies." Whatever be the merits of the parties' arguments, we need reach no conclusions on this issue since our finding that the Revised Agreement is not entitled to a labor exemption rests entirely on other grounds.

As to the second criteria, sections 8(a)(5) and 8(d) of the National Labor Relations Act (49 Stat. 452) define the "mandatory" issues of collective bargaining as "wages, hours, and other terms and conditions of employment". Although the National Labor Relations Act does not define what constitutes "terms and conditions of employment", other than wages and hours, the NLRB, with the approval of the courts, has initiated a system of classification by dividing subjects of bargaining into three categories: mandatory, permissive and illegal. Whether or not a subject of bargaining is mandatory or permissive depends upon the extent to which the agreement addresses itself to the labor relations of the contract

employer, vis-a-vis his own employees."[10] Obviously, while union and management may bargain on mandatory and other issues, this does not necessarily mean that any agreement concluded will not violate the antitrust laws and/or the Shipping Act.

Petitioners submit that at best the subject of the Revised Agreement is permissive only. In support thereof, Petitioners advance a three-prong argument, the substance of which alleges that the ILWU gained nothing that it did not already have by the terms of the overall PCLCA.[11] Petitioners first contend that, notwithstanding the Revised Agreement, nonmembers would continue to contribute to the fringe benefit programs in the same amounts as PMA members and signified their willingness to continue to do so. Secondly, they maintain that while the Revised Agreement resolved the "problem" of "steady men" by requiring uniformity with PCLCA's provisions, this was in actuality PMA's problem and not that of the ILWU, who allegedly had no interest therein. Finally, Petitioners argue that the requirement that participating nonmembers would pay dues and assessments into PMA to support labor relations programs

[10] See *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342 (1968); *Nat'l Woodwork Manufacturing Assoc.* v. *NLRB*, 386 U.S. 612 (1967).

[11] PCLCA (Pacific Coast Longshore & Clerk Agreement), which established the PMA-ILWU joint work force in 1935, is the basic collective bargaining agreement which has been amended to include a Memorandum of Understanding in which the Revised Agreement is a part thereof.

and would adhere to PMA labor policies had no relationship to "hours, wages, or working conditions".[12]

Thus, Petitioners' position here is that the issue here does not involve altering or modifying the wages, hours or working conditions of the ILWU—areas which would understandably be of primary concern to the union—but rather involves the matter of what a nonmember must agree to as a condition to directly employing ILWU labor.

Respondents argue that contrary to the belief of Petitioners, the Revised Agreement relates directly to a mandatory subject of bargaining. Moreover, Respondents point out that there has been a long bargaining history of nonmember participation in both the PMA-ILWU hiring hall and fringe benefit systems.[13]

The Revised Agreement, insofar as it changes the treatment of "steady men" and requires all direct hiring to be in accordance with PMA procedures, obviously affects hours or working conditions. The question is, however, whether the agreement is directed to the labor relations of the contracting em-

[12] This conclusion is primarily founded upon the remarks of Mr. Flynn, President of PMA, to wit:

> A nonmember share is measured by all the obligations included in the nonmember participation agreement, not just a monetary contribution (p. 9 of Mr. Flynn's affidavit).

[13] See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964), wherein the Court held that in determining whether or not a matter is a mandatory subject of bargaining, it is appropriate to consider bargaining history.

ployer, vis-a-vis his own employees. We think not. Since the primary purpose of the Revised Agreement is to bring nonmembers into the PMA "camp", that it affects the hours or working conditions of some of the members of the ILWU would appear to be only incidental to the main purpose of the agreement. Thus, we can only conclude that the matter of the Revised Agreement is not a mandatory subject of bargaining. While this finding may be sufficient to consider withholding a "labor exemption", our ultimate conclusion that the Revised Agreement is *not* entitled to a labor exemption rests on additional grounds.

Respondents have devoted much argument in their memorandum to support their contention that the Revised Agreement does not, as Petitioners have insisted, impose such terms upon persons or entities outside the bargaining group as would justify the denial of a labor exemption. In fact, Respondents, in furtherance of their argument that there are "a number of significant differences" between SMU 4 and the Revised Agreement, advise that one of the "changes" incorporated in the Revised Agreement was intended to allay any fears on the part of Petitioners that the Agreement imposed terms on outsiders. Notwithstanding such assurances and for reasons stated below, we agree with Hearing Counsel and Petitioners that the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force.

As such it clearly imposes terms and conditions upon persons outside the bargaining group.

To "remove any doubt" that the agreement between PMA and ILWU restricted the latter in its bargaining with nonmembers, Respondents explain that the note after Paragraph 3(b) of SMU 4 was deleted from the Revised Agreement. This note provided that:

> If a prospective nonmember participant has an agreement with the ILWU which provides for utilization of the joint work force at terms and conditions of employment more favorable to the nonmember than those provided under the PCLCA, including the CFSS [Container Freight Station Supplement], such nonmember must alter the agreement to conform to the PCLCA, including the CFSS, in order to become a nonmember participant.

Seattle and Petitioners view this deletion as being cosmetic only and in no way altering the effects of the agreement. In support of its position that PMA is still utilizing the joint work force as a means of controlling the labor policies of nonmember ports, specific reliance is placed on Paragraphs 2, 3, 6 and 12 of the Revised Agreement, to wit:

> 2. The nonmember participant's separate ILWU contract must conform with the provisions hereof, and the provisions of the PCLCA governing the selection of men for inclusion in the joint work force.
>
> 3. A nonmember participant will share in the use of the joint work force upon the same terms

as apply to members of PMA. For example a) the nonmember participant shall obtain men on the same basis as a PMA member from the dispatch hall operated by ILWU and PMA through the allocation system operated by PMA,

b) if a work stoppage by ILWU shuts off the dispatch of men from the dispatch hall to PMA members, nonmember participants shall not obtain men from the dispatch hall,

c) if during a work stoppaged by ILWU, PMA and ILWU agree on limited dispatch of men from the dispatch hall for PMA members, such limited dispatch shall be available to nonmember participants.

The essence of b) and c) of this section is the acceptance by nonmember participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against nonmember participants.

* * * *

6. For purposes of 1.53 through 1.57 of the Container Freight Station Supplement (CFSS) of the PCLCA, a nonmember participant who uses the joint work force at terms and conditions of employment no more favorable to the nonmember participant than those provided under the PCLCA, including the CFSS, may be deemed to be a "member of PMA" insofar as it is so using the joint work force.

* * * *

12. the ILWU-PMA Nonmember Participation Agreement shall be binding and continue in effect until terminated on such terms and conditions as may be mutually agreed to by the PMA, the

ILWU and the participant. An entity that terminates its participation shall at such time no longer be eligible to employ men in the joint work force nor to participate in the Pension, Welfare, Vacation and Pay Guarantee Plans existing between ILWU and PMA.

Consequently, while nonmembers are allowed to negotiate separate contracts, the contracts must, nevertheless, conform with the provisions of both the Revised Agreement and the master collective bargaining contract (Paragraph 2). Moreover, and nonwithstanding the further deletion by PMA of Paragraph 9 of SMU 4 from the Revised Agreement,[14] Paragraph 3 of the Revised Agreement still requires, in effect, that nonmembers adhere to PMA labor policies pursuant to a work stoppage by ILWU.

Additionally, Paragraph 6, by providing that if nonmembers use the ILWU work force on terms more favorable than to PMA members, the nonmembers will be deprived use of the PMA-ILWU joint work force, appears to allow for the imposition of work rules on nonmembers.[15]

As a further indication that PMA is still controlling labor policies of nonmembers, we note that the

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[14] Paragraph 9 of SMU 4 provided that if there were a cessation of work at the end of the contract period of the PCLCA and related agreements, the labor policy of PMA shall continue to apply to nonmember participants, and that nonmember participants shall continue to accept PMA's labor policy as their own.

[15] Paragraph 6 of the Revised Agreement is identical in intent to Paragraph 3(b) of SMU 4.

substance of the termination provision of Paragraph 12 of the Revised Agreement is akin to that of Paragraph 13 of SMU 4. Whereas Paragraph 13 provided that a contract could only be terminated by the joint action of PMA and ILWU, Paragraph 12 requires that the nonmember be included as part of this joint action. In effect, therefore, under either paragraph, the nonmember is still bound to the agreement for an indefinite period of time since the nonmember cannot unilaterally terminate the agreement but can only do so upon such "terms and conditions" as may be "mutually" agreed to by PMA and ILWU.

The foregoing, we believe, makes it clear that no substantial differences exist between the old SMU and the Revised Agreement. Whatever revisions were made in the Revised Agreement are changes in form only which in no way substantially alter the effect or impact of the agreement. The effect of the Revised Agreement, we find, is to require entities outside the bargaining group to either submit to its terms or incur the sanctions contained therein, i.e. deny nonmembers participation in PMA hiring halls and fringe benefit funds as well as the use of ILWU labor. In this regard, we agree with Hearing Counsel that the agreements at issue here "bear a striking resemblance" to that found unlawful under the antitrust laws in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

In the *Pennington* case, a group of large employers in the mining industry had agreed with the union to impose its wage and royalty scale on smaller non-

union operators outside the immediate bargaining group. Plaintiff there contended that this scheme was intended to eliminate from competition the smaller mine operators who allegedly could not withstand the costs of the particular terms and conditions of employment which would be forced upon them. The Court concluded that while a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers, it:

> . . . forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry. (381 U.S. at pages 665-66.)

We believe that the Court's rationale in *Pennington*, which is clearly not limited to the imposition of a wage scale but could involve any other labor standard, such as labor relations policy, is applicable to the agreements before us. Instead of a system of computing wages, which because of difference in methods of production would be more costly to one set of employers than another, the PMA and ILWU here have devised a scheme whereby the elimination

of all local agreements between nonmembers and the ILWU would result in higher costs to one set of employers (the nonmembers) than to another (PMA members); particularly, since the differences in methods of operation and locality are ignored.[16]

Respondents read *Pennington* as establishing only the principle that a union may not by agreement with one employer restrict its right to bargain with other employers. Such a reading of *Pennington* is far too restrictive and totally ignores the real issue in the case, i.e., the *imposition* of terms on persons outside the bargaining group. The fact that the scheme employed in *Pennington* required the UMW to surrender its freedom of action is only incidental to the Court's ultimate holding that a union and employers in one bargaining unit "are not free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry". (381 U.S. at 666.)

Even assuming that Respondents' interpretation of *Pennington* is correct, the Revised Agreement is still clearly inconsistent therewith, as clearly indicated by

[16] Petitioners cite as an example the Port of Olympia. Under its agreement with Local No. 47 in the Olympia area, the local provides, among others, checkers. If the Port were required to abrogate its local agreement and adhere to the requirements of the Coast Agreement, members of the ILWU Checkers' Union in Seattle would have to be employed, thus increasing the cost to the Port of Olympia by the amount of payments for travel time to and from Seattle. The same situation prevails at the Port of Port Angeles. This shift in costs directly affects the Ports' costs of providing terminal services and thereby the rates paid by the shipping public.

Paragraphs 2, 3, 6 and 12 of the aforementioned agreement, delineated earlier. Under Respondents' own interpretation of *Pennington*, the Revised Agreement restricts nonmembers' right to bargain and thereby imposes such terms upon entities outside the collective bargaining unit as to preclude the granting of a "labor exemption".

Addressing themselves to the fourth "labor exemption" criterion, Petitioners challenge PMA's contention that "no conspiracy" existed between PMA and ILWU. PMA argues that there is nothing in the Revised Agreement that precludes the ILWU from making whatever arrangements it and the nonmembers can negotiate. Seattle, on the other hand, refers to the ILWU's chief negotiator's remarks during negotiations over SMU 4 that the ILWU would cooperate with PMA and provide PMA with "insurance" against "legal entanglements" if PMA would be cooperative in other areas. In view of our finding here that the Revised Agreement is not entitled to a labor exemption by virtue of the fact that it imposes terms on parties outside the bargaining unit and is not a subject of mandatory bargaining, we find it unnecessary to resolve the merits of the "conspiracy" issue.

In the "final analysis", our assertion of jurisdiction over a labor-related agreement requires, as we noted in *Boston Shipping*, a consideration of the impact of such agreement on the competitive conditions in the industry, vis-a-vis its impact on the collective bargaining process. On this basis, and taking into

consideration several past court decisions [17] involving labor-related agreements, we find that while the Revised Agreement has a minimal effect on the collective bargaining process, it has such a potentially severe and adverse effect upon competition under the Shipping Act as would justify our consideration of its approvability under the standards thereof. Without passing on the individual merits of each of their contentions, we believe that Petitioners have generally demonstrated the possible adverse impact of the Revised Agreement and the effect its implementation could have on their ability to compete with PMA members. As Petitioners have pointed out, their failure to sign the Revised Agreement could well result in the closing of their facilities and the cessation of operations because (1) they will be denied ILWU personnel from the joint hiring hall; (2) if they employ non-ILWU personnel, ILWU personnel utilized by PMA stevedoring companies to load and unload cargo to and from ships will refuse to work the cargo; and (3) the ILWU would undoubtedly put up picket lines at the entrances of all ports' terminals, thus effectively stopping the movement of all cargo being delivered to or taken from such terminals by other

[17] See *Allen Bradley Co.* v. *Local 3 International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945); *Meat Cutters Union* v. *Jewel Tea Co., supra; United Mine Workers* v. *Pennington, supra; Volkswagenwerk* v. *FMC, supra;* and *NYSA and ILA* v. *FMC, supra.*

union personnel.[18] It follows, therefore, that the implementation of the Revised Agreement, as it may affect the receiving, handling, storing and delivery of cargo at petitioner ports, may involve violations of sections 16 and 17 of the Shipping Act, 1916.

On the other hand, we find that the Revised Agreement has little if any effect on the collective bargaining process. With or without the Revised Agreement, the provisions for fringe benefits, which are the main concern of the ILWU, remain unchanged.

Further, if petitioner ports contracted with PMA stevedoring companies (employing ILWU personnel) to perform all the terminaling services now directly performed by the ports themselves, the ports would be precluded from any decision-making power with respect to the performance of services at their terminals. Consequently, as a practical matter, Petitioners would be delegating to such stevedoring companies all ratemaking decisions, and thus, being profit-motivated, these companies would have discretion and incentive to divert cargo from one port to another by simply granting different rates for each area.

Finally, we should like to point out that we do not view our exercise of jurisdiction over the Revised Agreement as interfering with the collective bargaining process within the maritime industry. Such an

[18] Although conceding that longshoremen and clerks are available outside the PMA-ILWU joint work force, Petitioners submit that these types are not suitable for employment as they are unskilled labor; skilled labor can only be gotten from the ILWU work force.

assertion of jurisdiction does not violate the right of employees to bargain collectively through representatives of their choice. Further, we disagree with Respondents that our jurisdiction over the Revised Agreement will preclude the remaining sections of the master collective bargaining agreement from being implemented. At issue here is only the Revised Agreement which we consider severable from other provisions of the master collective bargaining agreement, i.e. the amount and kind of fringe benefits to be paid the union. The obligation of PMA to pay those benefits remains unimpaired. Consequently, the Commission's assertion of jurisdiction will have no effect upon PMA's obligations under the labor contract.

Therefore, weighing the various Shipping Act and labor interests raised by the Revised Agreement, we conclude, consistent with the court's holding and directives in *NYSA and ILA* v. *FMC*, *supra*, that the many and potentially severe shipping problems raised by the Revised Agreement balanced against the minimal impact our regulation thereof would have on the collective bargaining process fully warrants our denial of a "labor exemption" in this proceeding. While the court in *NYSA and ILA* v. *FMC*, *supra*, concluded that on the basis of facts involved therein it was "enough" for the Commission to find that the shipping interests outweigh the labor interests in asserting jurisdiction over a labor-related agreement, we believe that our discussion of the Revised Agreement in light of the four "exemption" criteria, is not only

responsive to the pleadings of the parties but also lends additional support to the conclusion reached here.

Commissioner Clarence Morse, dissenting. I dissent.

We are in an area which involves not only the Shipping Act, 1916, but also the antitrust laws and the labor laws, and it becomes a matter of judgment and line drawing in determining whether we should retain jurisdiction [19] or whether we should grant labor exemption and leave the matter for resolution by the courts and the NLRB. Under our decision in *Boston Shipping*, 16 F.M.C. 7, it remains within our sound discretion whether to grant labor exemption even when an agreement fails to meet one or more of our announced criteria.[20] It is my view that the impact

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[19] As to *subject matter*, the intra-PMA agreement concerning the ILWU-PMA Nonmember Participation Agreement is clearly a section 15 agreement. Whether such agreement meets section 15 standards as to *parties* is not established on this record and, with due respect to *NYSA & ILA* v. *FMC*, *supra*, I would have fundamental jurisdictional problems if, in fact, "mixed membership" exists within PMA. Under *Boston Shipping*, it would appear that PMA itself is primarily a collective bargaining unit and should receive labor exemption. However, that does not resolve the problem, for to find existence of a section 15 agreement between "common carriers by water" and "other persons subject to the Act" we must consider the membership of PMA, since the functions of PMA, a corporation, itself are neither that of a common carrier by water nor an "other person subject to the Act". ILWU is clearly neither of the described type of persons.

[20] In *United Stevedoring Corp.* v. *Boston Shipping Assoc.*, 16 F.M.C. 7 at 15 (August 24, 1972) we stated in part: "While we cannot here decide that every such collective bargaining

of the Revised Agreement vis-a-vis the collective bargaining process outweighs the impact of that agreement on the competitive conditions within the industry. In all events, the courts in the pending antitrust cases and the NLRB have far greater expertise in this antitrust and labor law area, and more flexible tools by way of treble damages, injunctive process, and otherwise, than do we to assure that the rights of all interested parties will be duly protected."[21]

I would grant labor exemption and stay our proceedings without prejudice pending resolution of the pending court cases, and if the involved agreements are found lawful by the courts and the parties carry out specific practices in a manner which may violate sections 16 or 17 of the Shipping Act, then Shipping

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agreement is entitled to a labor exemption, Hearing Counsel and the Department of Justice recommend the consideration of a section 35 rulemaking proceeding in order to exempt for the future this class of agreements from some or all of the requirements of section 15 of the Shipping Act, 1916, thereby not jeopardizing collective bargaining by any threat of pre-approval implementation penalty. This we intend to do." I again ask *WHEN* is this Commission proposing to initiate such a proceeding?

[21] In my opinion, the majority ignore the reality of labor-management relations when they suggest that denial of labor exemption to the Revised Agreement "will have no effect upon PMA's obligations under the labor contract." This is another indication of our lack of expertise in this labor-management field. An earlier example is the Court's reaction stated in its Opinion on Motion to Remand in *Boston Shipping Assoc.* v. *USA* (CA-1, No. 72-1004, May 31, 1972) when commenting on our earlier report in *United Stevedoring Corp.* v. *Boston Shipping Assoc.*, 15 F.M.C. 33 (1971).

Act concern may become substantial and the obligations of members of the PMA under the Shipping Act (and also the ILWU as "any other person" under section 16) may have to be determined by the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

Docket No. 72-48

PACIFIC MARITIME ASSOCIATION—COOPERATIVE WORKING ARRANGEMENTS; POSSIBLE VIOLATIONS OF SECTIONS 15, 16 AND 17, SHIPPING ACT, 1916

ORDER

The Federal Maritime Commission instituted this proceeding to determine, *inter alia*, whether the master collective bargaining contract entered into by the Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union embody any agreements between and among members of PMA, which agreements are subject to section 15 of the Shipping Act, 1916; and whether there were any labor policy considerations which would operate to exempt such agreements or practices from section 15 of the Shipping Act, 1916. The Commission having this date made and entered its report stating its findings and conclusions with respect thereto, which report is made a part hereof by reference:

THEREFORE, IT IS ORDERED, That pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C.

821), and consistent with the Commission's Order of September 6, 1972, as amended by its Orders of October 19, 1972 and January 30, 1974, the investigation in this docket shall proceed to determine:

1. Whether the "ILWU-PMA Nonmember Participation Agreement" (Revised Agreement), which is embodied in the ILWU-PMA master collective bargaining contract and which we have found to be subject to and must be filed in accordance with the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), should be approved, disapproved, or modified pursuant to that section;

2. Whether the implementation by PMA and the ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practices which will subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916 (46 U.S.C. 815);

3. Whether the implementation by PMA and ILWU of the provisions of the Revised Agreement and/or the master collective bargaining agreement will result in any practice which is unjust or unreasonable in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. 816);

4. Whether any labor policy considerations would operate to exempt these agreements or practices resulting therefrom from any provision of sections 16 or 17 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, and their respective members are hereby made respondents in this proceeding; and

IT IS FURTHER ORDERED, That a public hearing be held before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be determined and announced by the Administrative Law Judge; and

IT IS FURTHER ORDERED, That notice of this order be published in the *Federal Register* and that a copy thereof and notice of hearing be served upon Petitioners and both the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their respective members; and

IT IS FURTHER ORDERED, That notice of this order and notice of hearing be mailed directly to the Department of Justice, the Department of Labor and the National Labor Relations Board; and

IT IS FURTHER ORDERED, That all future notices issued by or on behalf of the Commission in this proceeding, including notice of time and place of hearing or prehearing conference, shall be mailed to Petitioners, the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union, individually, and on behalf of their members,

and any other person made a party of record to this proceeding; and

IT IS FURTHER ORDERED, That any person other than those named herein who desires to become a party to this proceeding and to participate herein, shall file a petition to intervene in accordance with Rule 5(1) (46 CFR § 502.72) of the Commission's Rules of Practice and Procedure.

FINALLY, IT IS ORDERED, That Seattle's Petition for Severance hereby is denied.

By the Commission.

/s/ Francis C. Hurney
FRANCIS C. HURNEY
Secretary

[SEAL]

APPENDIX D

Shipping Act, 1916, 39 Stat. 733, as amended, 46 U.S.C. 814:

> Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption.

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement,

or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreement between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than $1,000 for each day such violation continues: *Provided, however,* That the

penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

39 Stat. 734, as amended, 46 U.S.C. 815:

Discriminatory acts prohibited.

It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section other than paragraphs First and Third hereof shall be subject to a civil penalty of not more than $5,000 for each such violation.

Whoever violates paragraphs First and Third hereof shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

39 Stat. 734, as amended, 46 U.S.C. 816:

Discriminatory rates prohibited; supervision by Board.

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

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